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REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Court of Queen's Bench,
AND UPON
WRITS OF ERROR FROM THAT COURT TO THE
EXCHEQUER CHAMBER,
IN
HILARY, EASTER, AND TRINITY TERMS, 1843.

BY
CHARLES JAMES GALE, ESQ.
AND
HENRY DAVISON, ESQ.
OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

VOL. II.

WITH
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J U D G E S
OF
THE COURT OF QUEEN'S BENCH,

During the period comprised in this volume.



The Right Hon. THOMAS LORD DENMAN, C. J.

The Hon. Sir JOHN PATTESON, Knt.

The Hon. Sir JOHN WILLIAMS, Knt.

The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

The Hon. Sir WILLIAM WIGHTMAN, Knt.



ATTORNEY-GENERAL.

Sir FREDERICK POLLOCK, Knt.

SOLICITOR-GENERAL.

Sir WILLIAM WEBB FOLLETT, Knt.

MEMORANDA.

MR. Justice Bosanquet in Michaelmas Vacation last resigned his seat in the Court of Common Pleas.

In the following Hilary Term he was succeeded by *Cresswell Cresswell*, of the Inner Temple, Esquire, Queen's Counsel, who was made Serjeant at Law, and gave rings, with the motto "*Leges juraque*," and was shortly afterwards knighted.

In the same vacation *Francis Stack Murphy*, of Lincoln's Inn, Esq. was made Serjeant at Law, and gave rings, with the motto "*Incidere ludum*."

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ERRATA.

In Marginal note to *Spilsbury v. Clough*, p. 17, for "Jac. 3," read "Jac. 1, c. 3."
 In *Hunt v. Robins*, p. 652, line 5, for "bill of exchange," read "bill of sale."

**Those Cases in this volume to which no signature is attached are reported
by Mr. W. R. SEYMOUR FITZ-GERALD of the Northern Circuit.**

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH,

IN

HILARY TERM,

IN

THE FIFTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
Lord DENMAN C. J. COLERIDGE J.
PATTESON J. WIGHTMAN J.

In the Bail Court,
WILLIAMS J.

5.

The QUEEN v. The EASTERN COUNTIES RAILWAY
COMPANY.

1842.

*Saturday,
Jan. 22nd.*

MANDAMUS to the Company to increase the height of a bridge erected by them over a public carriage road.

By sect. 9 of the Eastern Counties Railway Company Act they are empowered to raise or lower any ways the more con-

The writ recited section 100 of 6 & 7 *Will.* 4, c. cvi. (local, personal and public), which enacts, "that where any bridge should be erected by the said company, for the

veniently to carry the same over or under the railway. By s. 100, where any bridge is erected across any public carriage road, not being a turnpike road, there is to be a clear height from the surface of the carriage road, to the centre of the arch of the bridge of not less than 16 feet.

By s. 120, nothing in the act is to derogate any of the rights or privileges of any parish, over which the railway shall pass, acting under any local act.


Held, that, the railway having been carried over a street by means of a bridge, which, for the convenience of the railway levels, left a space from the arch of the bridge to the street below, of 15 feet. 1 inch only, the Company had a right to lower the street in order to give the height required by the statute, notwithstanding that the street was under the control of commissioners by a local act, (12 *Geo.* 3, c. 38,) which enacted, that "no person shall alter the form of any pavements which shall be now made by virtue of this act, without the consent of the commissioners or in anywise incroach thereon, or put up any posts, boards, &c."

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purpose of carrying the said railway over or across any public carriage road, not being a turnpike road, the span of the arch of such last mentioned bridge should be formed, and should at all times be and be continued of such width as to leave a clear and open space under every such last mentioned arch of not less than 18 feet, and of a *height* from the surface of such carriage road, not being a turnpike road, to the centre of such arch of not less than 16 *feet*, and the descent under any such last mentioned bridge should not exceed one foot in 20 feet."

The writ then proceeded thus: "And whereas we have been informed &c., that you the said Company did take upon yourselves the execution of the powers of the said act, and in pursuance thereof did begin to make and have in part completed the said railway, and that, after the passing of the said act, to wit, on or about the month of June, 1840, you did make and erect, or cause to be made and erected, a certain bridge over and across a certain public carriage road, not being a turnpike road, called Brick Lane, situate in the several parishes of Christ Church, and Saint Matthew Bethnal Green (or one of them), in our county of Middlesex, for the purpose of carrying the said railway over and across the same, but that the span of the arch of the said bridge has been so formed by you, that the clear and open space left under the said arch is of less height than 16 feet from the surface of the public carriage road aforesaid to the centre of such arch, to wit, of the height of 15 feet and one inch only, contrary to the provisions of the said act. And whereas we have been further informed, that application hath been in due manner made to you, by and on behalf of the commissioners acting under and by virtue of a certain act &c., (12 *Geo.* 3, c. 38.) for paving, regulating &c., the squares, streets, and other public passages and places within the said parish of Christ Church, and also such parts of Brick Lane aforesaid as are not within the said parish, to alter or reconstruct the said bridge so as to form the span of the arch of such bridge of

a height from the surface of the public carriage road aforesaid to the centre of such arch of not less than 16 feet, according to the provisions of the said act, and to your duty in that behalf; yet that you the said Company &c., have neglected and refused &c., in contempt &c., to the great danger of the obstruction of the public carriage road aforesaid, and to the great damage and grievance of all our liege subjects there inhabiting and having occasion to use the same, as we have been informed &c., and we, being willing &c., do command you the said Company &c., that, immediately &c., you do make the said arch or bridge so by you erected as aforesaid, for the purpose of carrying the said railway over and across the said public carriage road called Brick Lane &c., conformable to the provisions of the said act &c., or that you shew us cause &c."

The return to the writ set out the ninth section of the Company's act, which enacted, "that, for the purposes and subject to the provisions and restrictions of this act, it shall be lawful for the said Company, their agents and workmen, and all other persons by them authorised, and they are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, and to survey and take levels of the same, or any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use, and in or upon such lands or any lands adjoining thereto to bore, dig, cut, embank, and soogh, and to remove or lay, and also to use, work, and manufacture, any earth, stones, trees, gravel or sand, or any other materials or things which may be dug or obtained therein, or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing or using the said railway, and other works by this act authorized, or which may obstruct the making, maintaining, altering, repairing or using the same respectively, according to the full and true intent and meaning of this act; and also to make and construct upon, across, under or over the

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said railway or other works, or any lands, hills, valleys, streets, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges whether temporary or permanent, roads, ways, passages, conduits, drains, piers, arches and fences; and also to erect and construct such houses, wharfs, warehouses, tollhouses, landing places, engines and other buildings, machinery and other conveniences and works of all descriptions as the said Company shall think proper; and also to alter the course of any rivers, canals, brooks, streams or watercourses, for such time as may be judged necessary by the said Company for constructing or maintaining any of the works aforesaid. And also to divert or alter the course of any rivers, or streams of water, roads or ways, *or to raise or lower any such* rivers or streams of water, *roads or ways*, in order the more conveniently to carry the same over or under, or by the side of the said railway, and to make drains or conduits into, through or under any lands adjoining or near to the said railway, except houses or buildings, for the purpose of conveying water from or to the said railway, and also from time to time to alter, repair, or discontinue the aforesaid works or any of them, and to substitute others in their stead. And generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering or repairing and using the said railway and other works by this act authorised, they the said Company, their agents and workmen, doing as little damage as may be in the execution of the several powers to them hereby granted, and the said Company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used or injured, for all damages by them sustained in or by reason of the execution of all or any of the powers hereby granted, and this act shall be sufficient to indemnify the said company and all other persons for what they or any of them shall do by virtue of

the powers hereby granted, subject nevertheless to such provisions and restrictions as are hereinbefore mentioned and contained. Provided that all works which may be done by the said Company relating to the drainage of the said railway and lands shall be subject to the regulations of the commissioners of sewers within whose limits such railway and lands shall be situate. Provided also that nothing herein contained shall authorise or empower the said Company to alter or divert the course of the river Lea, or of any rivers, brooks, streams, or watercourses, within the parish of West Ham in the county of Essex, or of the river Wensou otherwise called the Yare, in the county of Norfolk, and city of Norwich, and county of the same, or any rivers, brooks, or streams running into the same last mentioned river."

And we the said Eastern Counties Railway Company do further most humbly certify and return, that the said bridge in the said writ mentioned was made and erected by us the said Company for the purpose of carrying the said railway over the said road called Brick Lane, pursuant to the act of parliament in the said writ first mentioned. That the said road at the time of the making of the said bridge was and thence hath been and still is a paved road, and that the pavements of the said road before and at the time aforesaid and still are vested in the said commissioners, in the said writ mentioned, under and by virtue of the said act of parliament in the other writ secondly mentioned, and that the control and management of the said pavements was and is vested in the said commissioners. That the original plan, prepared and adopted by us the said Company for making and erecting the said bridge, was to make and erect the same as it now is, and to lower the road under the said bridge, so that the descent under the same should not exceed one foot in 20 feet, and so as to leave a clear and open space under the said arch of the said bridge of not less than 18 feet, and of a height from the surface of the said road to the centre of the said arch of full 16 feet, according to the provisions of the said act in the said writ

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first mentioned. That such plan was carefully examined and considered by us the said Company, before the adoption of the same as aforesaid, and that it appeared to us to be in every respect the most desirable plan that could be devised for making and erecting the said bridge, regard being had to the nature and situation of the road over which the said bridge is carried, and to the line of the said railway. That the due and proper construction of the works of the said railway rendered it necessary that the said bridge should be made and erected as it now is and at its present elevation, and that, if the same had been made and erected at any greater elevation, an ascent would have been thereby caused on the line of the said railway where the same passes over Brick Lane as aforesaid, and the level of the said line would have been thereby destroyed, and the engines and carriages used on the said railway could not safely have passed along and over the said bridge. And we the said Company do further humbly certify and return, that we have always been and still are ready and willing to make the said arch or bridge conformable to the provisions of the said act of parliament in the said writ first mentioned as aforesaid. And we the said Company, before the issuing of the said writ, were about to do and perform the said works, and lower the said road according to the provisions in all respects of the said last mentioned act, and to make the said arch or bridge conformable to the said provisions, but the said commissioners in the said writ mentioned then and there refused to permit the said Company so to do; and they the said commissioners have thence continually hindered and prevented and still do hinder and prevent us the said Company from lowering the said road, and performing the said works, and making the span of the arch of such bridge of a height from the surface of the said road to the centre of the said arch of not less than 16 feet, according to the provisions of the said last mentioned act as aforesaid. Wherefore and for no other cause whatsoever we the said Eastern Counties Railway Company have been and still are hindered and prevented from making,

and have not made, the said arch or bridge so by us erected as aforesaid, for the purpose of carrying the said railway over and across the said public carriage road called Brick Lane, conformable to the provisions of the said last mentioned act of parliament as by the said writ we are commanded.

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The case was now argued (a), after a concilium, by *Warren* for the prosecution, and *Butt* for the Company. At the close of the argument, Lord *Denman* C.J. intimated an opinion, that the mandatory part of the writ should have required some particular thing to be done to the bridge, instead of requiring in general terms, that it "should be made conformable to the provisions of the said act."

Cur. adv. vult.

COLERIDGE J. at the sittings after this term (Feb. 3), delivered the judgment of the Court as follows:—In this case the question, raised in argument upon the return to a mandamus, was whether the defendants were at liberty to procure a certain required height, from the centre of an arch to the surface of the street under, by lowering the pavement of the street; or could be compelled to procure it by raising the level of the railway, which passed over the arch, or in any other way. The defendants contended for the former; the prosecutors, who are the commissioners for paving Christ Church, the latter.

This question was admitted to turn on the construction of the 9th section of 6 & 7 *Will.* 4, c. cvi, taken in connexion with the 120th section of the same act, and one of the clauses of the 12 *Geo.* 3, c. 38, a statute under which the commissioners were appointed and enjoy certain rights, and exercise certain powers in the parish of Christ Church, in which the street in question is situated.

The 9th section above mentioned is the one usually found in acts of this description, and gives the Company

(a) Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.

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very large but necessary powers for constructing the railway, and among others the power "to raise or lower any rivers or streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the railway." It has been necessary to carry the railway on an arch over this street, and, the street not being a turnpike road, the 100th section requires that there must be a height from its surface to the centre of the arch of not less than 16 feet, and that the descent under the arch shall not exceed one foot in 20. The commissioners do not dispute the right to carry the railway on the arch, nor is it alleged that the proposed lowering of the pavement would make the descent more than one foot in 20; but they deny the right to alter or in any the slightest degree to meddle with the pavement. If the question stood on the two clauses alone, there could be no doubt. The ninth in express terms contemplates the lowering of roads, and the 100th, when it limits the steepness of descent under an arch, clearly looks to an alteration of level to be produced by the railway works: if there were a natural descent of any conceivable steepness under an arch erected by the company, they would not be bound to reduce it to the limits prescribed by the section.

But it is said that the powers of the ninth section are expressly given "subject to the provisions and restrictions of the act," and that one of the provisions included in the general words is to be found in the 120th section, which provides that "nothing in the act shall extend to prejudice, derogate, or diminish, any of the rights or privileges of any parish over which the railway shall pass, acting under and by virtue of any local act." The parish of Christ Church is then said to be within these words,—because the paving, cleansing, lighting &c., and regulating of the squares and streets in it, are by a local act (the 12 Geo. 3 before mentioned), placed under the controul of commissioners in whom the pavements are vested. The same statute enacts "that no person shall alter or cause to be altered the form of any pavement which shall be new made by virtue of

this act without the consent of the commissioners, or in any wise encroach thereon" (a). If this had been the whole of the section, it would have been very questionable whether it could have been construed so as to restrain the Company from exercising powers plainly given under an act so long posterior in point of time, and which in many instances are so essential to the carrying out the purposes of their act. It would also be very questionable whether a local act, such as the one in question, comes within the meaning of the 120th section of the Railway Act. That section saves the *rights and privileges of any parish acting under any local act,*" words which seem not very applicable to the case of the paving and lighting of a parish being placed under the management of commissioners. This section indeed follows as a proviso on a section which gives a mode for indemnifying parishes as to their poor and other rates, where they would be otherwise diminished by the rendering houses and other property unrateable during the construction of the railway, and it seems rather intended to save the peculiar rights which local acts might have given to particular parishes as to the modes of assessment and collection.

But, without deciding the question on these suppositions, it seems to us that the point is clear when the whole section of the 12 Geo. 3 is looked at. After the words already cited on which the prosecutors rely, these immediately follow, "or put up any post or posts, step or steps, or erect any bulks or stalls, or place out any shew glasses, or shew boards, or make any dungholes, or saw pits, or other matters or things so as to be an encroachment, upon pain of forfeiting for every such offence any sum not exceeding 5*l.*, nor less than 40*s.* over and above the expenses of relaying and reinstating such pavement" &c. (a). It is clear then that this section was inserted merely as a police regulation, to prevent what are commonly called street nuisances and encroachments, and the words "*form of the pavement*" are well suited for such a purpose. To lower the street and

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relay the pavement in the same form and of the same dimensions, but on a different level, is scarcely to "alter the form of the pavement," and we should be straining the words beyond their natural meaning to include a case never contemplated by the legislature, if we were to give them the force contended for by the prosecutors.

Their counsel also relied on a section in the same act, which vests the property of the pavements in the commissioners, but this appears to us immaterial. The Company by what they propose to do will not interfere with the property, which must of course in every case be in some person or body, and the act which incorporates them expressly authorises them to lower roads.

Upon the whole therefore we think the return to the mandamus sufficient, and that our judgment must be for the defendants.

D.

Judgment for the defendants.

Thursday,
 Jan. 27th.

Under 5 & 6
Will. 4, c. 76,
 s. 9, which
 provides that
 no occupier
 shall be on
 the burgess
 roll, "unless
 he shall have
 been rated in
 respect of
 such premises

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WHATELEY, in Michaelmas term, obtained a rule nisi for a mandamus directed to the mayor of the borough and city of Lichfield, to insert the name of *George Allton* on the burgess roll of that borough, pursuant to the statute 7 *Will.* 4 and 1 *Vict* c. 78, s. 24.

It appeared from the affidavits, on which the rule was so occupied by him to all rates made for the relief of the poor of the parish wherein such premises are situated, and unless he shall have paid all such rates, including therein all borough rates, if any, directed to be paid under the provisions of this act, as shall have become payable by him in respect of such premises," a party is not disqualified by non-payment of rates assessed upon him under an old local paving and lighting act, the powers of which had been transferred from the statutory trustees to the corporate body under 5 & 6 *Will.* 4, c. 76, s. 75.

2. Nor, under another proviso of 5 & 6 *Will.* 4, c. 75, s. 9, "that no person shall be so enrolled in any year who within twelve calendar months next before the said last day of August shall have received parochial relief, or other alms, or any pension or charitable allowance from any fund intrusted to the charitable trustees of such borough," is he disqualified by the receipt of charity from the trustees (not being "trustees of such borough") of a charitable institution "for the use and benefit of poor housekeepers of the city not receiving parochial relief."

obtained, that an objection was taken at the Mayor's revision court in October, 1841, to the applicant's claim, on the ground of the admitted nonpayment of three rates, which had been assessed upon him in 1838, 1839, and 1840, as the occupier of the premises in respect of which he sought to be put on the burgess roll, under the provision of a local act (a), "for paving, cleansing, lighting, watching, and regulating, the streets, lanes, and other public passages and places within the city of Lichfield, and the suburbs thereof." The powers vested in the trustees by this act had been transferred under the provisions of the 75th section of the Municipal Corporation Act (b), to the body corporate in 1836, and the rates which gave rise to the objection had been imposed by the council. The limits to which the local act extended did not comprise the whole of the borough, as described in the Municipal Corporation Act (c); and the Cathedral Close, which was within the old borough, was expressly excepted. It did not appear that any order had been made by the town council under the 87th section for the purpose of lighting these excepted portions. The mayor and one of the assessors held the objection to be good, and the name was struck out; no other objection was then suggested in opposition to the rule. The affidavits in opposition to the rule stated that *Allton* had during eleven years, including last year, received annually relief, which he applied for on the ground of poverty, from the trustees of a certain public "charitable institution, and of certain estates granted for charitable purposes in the said city, called Wakefield's otherwise Rawlin's charity, the annual income of which is laid out and disposed of to the use and benefit of the poor housekeepers of the said city, *not receiving parochial relief* from any parish in the said city." The relief so given was in one sum annually, and had never exceeded 7s. 6d. in any one of the years mentioned.

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(a) 46 *Geo.* 3, c. 42.

(b) 5 & 6 *Will.* 4, c. 76, see
 sched. E.

(c) Sect. 7, adopting the boundaries as settled by 2 & 3 *Will.* 4, c. 64.

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Waddington and *Cole* now shewed cause. There are two answers to this application: the first is, the nonpayment of rates; the second, the receipt of alms within the meaning of the 9th section of the Municipal Corporation Act. Although the latter objection was not made at the mayor's court, it may now be insisted upon, as this Court is required by the statute under which this rule was obtained, to inquire into the title of the applicants, and it would have been useless for the court below to have gone into the second objection, after the name had been expunged on the first.

The first objection arises from the language of the 9th section, which provides, that no person shall be enrolled "unless he shall have been rated in respect of the premises occupied by him within the borough to all rates made for the relief of the poor of the parish, within which such premises are situated during the time of his occupation, and unless he shall have paid on or before the last day of August as aforesaid all *such* rates, including therein all borough rates, if any, directed to be paid, under the provisions of this Act, *as* shall have become payable by him in respect of the said premises, except such as shall have become payable within six calendar months next before the said last day of August." The act requires two things to be observed with respect to rates, the one that the person must be rated, but, as to that, only to the poor rate, but, when it proceeds to speak of payment, it does not use the words "poor rates" as had been previously done in the Reform Act (*a*), which being *pari materiâ* may legitimately be applied in construing this act; the language is general, "all such rates as shall have become payable by him in respect of the said premises," thus including every rate whether poor rate or other rate. In support of this rule, it is sought to limit "such rates" to poor rates, yet it is clear that the word "such" has reference to the subsequent word "*as*," and, even conceding that it might have a double aspect, and refer not only to the word "*as*,"

(*a*) 2 & 3 Will. 4, c. 45, s. 27.

but also to the rates previously mentioned, (which is a forced construction), such an intention is here negated by the introduction of the words "including therein all borough rates, if any directed to be paid under the provisions of this act." The poor rate and borough rate are distinct things, and the mention of the latter seems to have been made for the express purpose of preventing the limitation now suggested. It is not however necessary to contend for this present purpose that all rates are included, for, since the adoption of the local act by the corporation, this is a borough rate directed to be paid under the provisions of the clause in question. The local act is referred to in schedule E., and, as soon as the transfer of powers took place, it became as it were incorporated in the general act. [Coleridge J. Is not the borough rate added to and collected out of the poor rate?] That is so now by virtue of 7 Will. 4 and 1 Vict. c. 81, but this shews that the poor rate and borough rate were previously distinct.

Secondly. There has been a receipt of "alms" within the meaning of the ninth section, which declares that no person shall be enrolled who has within the year received "parochial relief or other alms, or any pension or charitable allowance from any fund intrusted to the charitable trustees of such borough." The object was to ensure independence on the part of burgesses, and the succeeding section, respecting medical or surgical assistance and the education of children at public or endowed schools, shews that even such modes of relief were deemed by parliament to have been comprised, and the relief here afforded is of a far more objectionable kind. Upon the corresponding clause in the Reform Act (a), containing similar words, "parochial relief or other alms, which by the law of parliament now disqualify from voting in the election of members to serve in parliament," it has been decided by the parliamentary committees that any funds given in aid of parochial relief are contemplated, and there the word "alms" is not put in

(a) 2 & 3 Will. 4, s. 36.

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juxtaposition with public charities as it is here. All the objections, which can exist to the receipt of relief from the charitable trustees of the borough, exist to the receipt of the charity in question. Mere private charity would not perhaps be within the mischief, or within the words, but by the use of the word "other" the legislature intended to point out something different from parochial relief, and yet something of the same public nature, which this clearly is. It cannot mean other parochial alms, for there are none such. A single instance of relief might not disqualify, but here the relief has been regular.

Whateley contra was not heard.

Lord DENMAN C. J.—This is an application to insert the name of a person on the burgess roll, who is admitted with two exceptions to have made out a good title, and, unless the disqualifications insisted upon are clearly proved, we are bound to make the rule absolute. The ninth section of the statute requires the party to be rated to the poor rates, and to pay "all *such rates*, including therein all borough rates, if any, directed to be paid under the provisions of the act, as shall have become payable by the party in respect of his premises." The only rates previously mentioned in the act are the poor rates, and the sole difficulty in construing the clause, arises from the introduction of the words "including all borough rates," for, if these did not occur it would be clear, even with the words "as shall have become payable in respect of the premises," that poor rates only were contemplated. The borough rate here mentioned means that to be made under the 92nd section, which enables the town council to order a borough rate in the nature of a county rate. The county rate is collected with the poor rate; and the legislature appears to have contemplated the collection of this borough rate in the same manner, and inserted the words "including all borough rates," to obviate any doubt whether they were

included in the poor rate. This construction gets rid of the only difficulty in construing "such rates" to mean the rates before mentioned only.

As to the other objection, I think the adjective "parochial" applies to "alms" as well as to "relief," and the "other alms" intended, are such as are given in aid of a parish. The relief in question is given to persons who are not in receipt of parochial relief, and clearly it is not a charitable allowance under the concluding part of the sentence, for the public corporate trustees of the borough have nothing to do with it.

PATTERSON J.—The first objection is that the applicant has not paid the local rates imposed upon him, and the argument is that, although the grammatical construction of the word "such" might be either way, and include only the poor rate, which is mentioned in the preceding part of the sentence, yet, since the borough rate is not a poor rate, but distinct from it, the words "all such rates" must comprise rates of every description. If such were the intention of the legislature, it is difficult to conceive why the words "including all borough rates" were inserted at all, and also the word "such" was inserted, for all rates imposed upon the party in respect of the premises would have included them. I therefore think "all *such* rates" mean poor rates.

As to the other objection, if the words "other alms" would have included charitable allowance from the borough trustees, it would have been unnecessary to mention the latter, and its insertion shews that it was intended to exclude from the operation of the act charitable allowances from any other trustees whatever. It is difficult to conceive how the education of a child in any public or endowed school could have been thought to be a matter within the 9th section; but, because it is declared by the 10th section not to be within it, that is no proof that it would have been within it, if that declaration had not been made, and most

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probably the provision was put in merely to obviate the possibility of doubt. .

COLERIDGE J.—I am of the same opinion. In order to possess a qualification, the person must be rated to the poor rates; he must pay also all such rates as shall have become payable more than six months previously. Had the clause stopped here, there would have been no doubt; and I cannot understand how the subsequent words extend the meaning, for, if all rates were intended, the specifying the borough rate in particular was idle, and the only mode by which full effect can be given to all the words is by limiting the meaning to poor rates including borough rates. The borough rates here mentioned are clearly those contemplated by the 92nd section, and not partial rates, like those levied under the local act. And notwithstanding the borough rates cannot be strictly said to be included in the poor rates, yet the person framing the act, and directing them to be in the nature of a county rate, might naturally consider that they would be raised by the same means, and thus form part of the poor rates. The recent act (a) does not specify the mode by which the borough rates had been levied, but it is manifest that the raising them in conjunction with the poor rates was not a practice utterly unknown.

Mr. *Waddington* has rested the second objection on the words "other alms," and says they must receive the same construction as under the Parliamentary Reform Act. The general law of disqualification there referred to is unknown, and I think "other alms" must mean other parochial alms. The first part of the 10th section might have an operation, as medical assistance may be parochial relief according to decided cases, and thus medical or surgical assistance given by the charitable trustees might be a charitable allowance within the 9th section, but the concluding sentence has no operation, and was merely put in by way of caution.

WIGHTMAN J.—The words "all such rates" apply to

(a) 7 *Will.* 4 & 1 *Vict.* c. 81.

several successive rates of the same description, and not to several descriptions of rates, and as that might possibly exclude all other rates, the provision as to borough rates was thrown in by way of parenthesis, the legislature evidently considering by sect. 92 that the borough rate would have all the incidents of the county rate. Parochial relief or other alms must be construed to mean alms in the nature of, though not identical with, parochial relief.

D.

Rule absolute.

SPILSBURY and ABBOTT v. CLOUGH and another.

Friday,
January 22d.

CASE for infringing a patent. The declaration stated that one *Maugham* in 1836 had obtained a patent for certain improvements in the production of chloride of lime, and certain other chemical substances. That by indenture of the 16th April 1839, made between *Maugham* of the first part, *Spilsbury*, (the plaintiff), of the second part, and *Abbott*, (the plaintiff), of the third part, *Maugham* assigned to *Abbott* two equal undivided third parts in the letters-patent. That by another indenture of the same date, between *Maugham* of the one part, and *Spilsbury*, (the plaintiff), of the other, *Maugham* assigned to *Spilsbury* one equal undivided third-part in the letters-patent. That on the 17th April, 1839, by indenture then made between *Abbott* of the one part, and *Maugham* of the other, *Abbott* re-assigned the said two-third parts to *Maugham*.

That whilst *Maugham* was so possessed of and interested in the said two-third parts as last aforesaid, and before the committing of the grievances, to wit, on the 14th November,

and meaning of the act of parliament in that case made and provided." *Held*, on special demurrer, that the plea was bad for ambiguity, because it was doubtful whether the defence set up was, that the manufacture was not new, or that it was not within the statute 21 Jac. 3, s. 5.

Scilicet, that the plea might have been good, as containing an entire defence in one connected proposition, if the words in the last mentioned section, in favour of letters-patent, "of the sole working or making of any manner of new manufacture within this realm," had been embodied in the plea.

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Under 5 & 6 Will. 4, c. 83, s. 1, the grantee of letters-patent may enter a disclaimer, though at the time of doing so he has parted with a portion of his interest in the patent. A plea to a declaration for infringing a patent alleged that "the invention was not, at the time of making the letters-patent, a new manufacture within this realm within the true intent

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1839, *Maugham*, by virtue of the 5 & 6 *Will.* 4, c. 83, the leave of the Solicitor General having been first obtained, and certified by his fiat and signature, duly entered with the clerk of the patents of England a disclaimer of a certain part of the invention.

That afterwards and before the committing &c., to wit, on the 14th November, 1839, by indenture between *Maugham* of the one part, and *Abbott* of the other, *Maugham* assigned the two-thirds back again to *Abbott*.

The declaration then set out the circumstances of the infringement.

4th plea. That the said invention in the letters-patent mentioned &c., was not at the time of the letters-patent *a new manufacture within this realm*, within the true intent and meaning of the act of parliament in that case made and provided. Verification.

Special demurrer, on the grounds that it does not appear with certainty, whether it is intended in the plea to dispute that the invention is new, or that it is a manufacture within the meaning of the statute; and that, although in the plea it is alleged, that the said invention was not at the time of making the letters-patent a new manufacture, yet it is not stated nor does it appear thereby, whether the said defendants intend to rely upon the fact that the invention was not at the time of the making of the letters-patent publicly known, or that the said invention was not new to the inventor, and also that the plea attempts to put in issue matter of law, namely, whether the invention is a manufacture within the meaning of the statute &c. The defendant gave notice in his points for argument, that he should object to the declaration.

Petersdorff, in support of the demurrer. It will be objected to the declaration that *Maugham* had no right under 5 & 6 *Will.* 4, c. 83, s. 1 (a), to enter the disclaimer,

(a) The section is as follows: certain additions to and alterations
 "whereas it is expedient to make in the present law touching letters-

because at the time of entering it, he was not possessed of the entire interest in the patent, but of two-thirds only.


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patent for inventions, as well for the better protecting of patentees in the rights intended to be secured by such letters-patent, as for the more ample benefit of the public from the same, be it enacted, that any person who, *as grantee, assignee, or otherwise*, hath obtained, or who shall hereafter obtain, letters-patent, for the sole making, exercising, vending or using of any invention, may, if he think fit, enter with the clerk of the patents of England, Scotland or Ireland respectively, as the case may be, having first obtained the leave of his majesty's attorney general or solicitor general, in case of an English patent, of the lord advocate or solicitor general of Scotland, in case of a Scotch patent, or of his majesty's attorney general or solicitor general for Ireland, in case of an Irish patent, certified by his fiat and signature, a disclaimer of any part of either the title of the invention, or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters-patent, and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and inrolled with the specification, shall be deemed and taken to be part of such letters-patent, or such specification, in all courts whatever. Provided always, that any person may enter a caveat in like

manner as caveats are now used to be entered against such disclaimer or alteration, which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the attorney general, or solicitor general or lord advocate respectively. Provided also that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was inrolled, but in every such action or suit the original title of specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters-patent have been or shall have been granted, provided also, that it shall be lawful for the attorney general, or solicitor general, or lord advocate, before granting such fiat, to require the party applying for the same to advertize his disclaimer or alteration, in such manner as to such attorney general or solicitor general or lord advocate shall seem right, and shall, if he so require such advertisement, certify in his fiat, that the same has been duly made."

Sect. 2 enacts, "That if in any suit or action it shall be proved, or specially found by the verdict of a jury, that any person *who shall have obtained letters-patent* for any invention or supposed invention was not the first inventor thereof, or of some part thereof, by reason of some other person or persons

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But the statute gives the power of disclaimer to "any person who, as grantee, assignee, or otherwise, hath obtained letters-patent;" so that *Maugham* had power to disclaim either in his original character of *grantee*, or in his subsequent character of assignee. As assignee, certainly, he had "obtained" two-thirds only of the patent at the time of disclaimer; but the plaintiffs have assented to his act by bringing this action.

2. The plea is bad for ambiguity. It alleges that the invention was not "a new manufacture within this realm" within the meaning of the statute; so that it is doubtful whether the defendant means to contest the novelty of the invention, or that it was such a manufacture as comes within 21 *Jac.* 1, c. 3, s. 5.

Cleasby, contra. The declaration shews no right of action; for *Maugham*, at the time of disclaimer, was possessed of two-thirds only of the patent. The circumstance of his having been the original grantee is immaterial. It is not probable that the legislature intended anything so unreasonable as that the original grantee should at any time, after he has parted with his interest, have the power of affecting the patent; and the phrase "*obtained* letters-patent" in the statute clearly means "possessed of letters-patent." If the concurrence of other part owners in the patent would qualify *Maugham* to enter the disclaimer, their concurrence should have been averred.

2. The plea is good. If it is bad, it is bad for duplicity; and it has not been demurred to on that ground. The plea alleges distinctly that the invention was not a new manufacture within the statute of *James*. There is no ambiguity in that allegation, though it may be objected to

having invented or used the same, or some part thereof, before the date of such letters-patent," &c. then that, if the patentee bona fide believed himself to be the

first inventor, he may petition his majesty in council to confirm the said letters-patent, or to grant new letters-patent &c.

as double, inasmuch as it denies both that the invention is new, and that it is within the statute. But the plea is in truth not double; for the allegation is one connected proposition, containing a single defence, to which both the statements involved in the allegation are necessary: such a mode of pleading is good according to *O'Brien v. Saxon* (a).

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Petersdorff in reply. [*Patteson* J. "Obtained" cannot very well be taken merely to mean "possessed," in the statute 5 & 6 *Will.* 4, for in the 2nd section provision is made for allowing a party who has "obtained" a patent for something, of which it turns out he was not the first inventor, to petition for a confirmation of the patent; in that section the person spoken of as having "obtained" the patent, is clearly the original grantee. *Wightman* J. The plea does not follow the words of the 5th section of the statute of *James*, which makes a reservation in favour of letters-patent "heretofore made of the sole *working* or making of any manner of new manufacture within this realm."]]

The plea is uncertain. It would be difficult in advising on evidence to say what defence the plaintiff must be prepared to meet.

LORD DENMAN C. J.—The first question is, whether the declaration is good, which shews that the disclaimer was made by the original grantee of the letters-patent at a time when he had not the entire interest in them. I think that the grantee had the right to make such disclaimer under the express words of the statute, and that the declaration is good.

The next question is, whether the plea is good. If the plea had employed the words used in the 5th section of the statute of *James*, I should have thought it might be treated


(a) 2 B. & C. 908; S. C. 4 D. & R. 579.

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as a complicated proposition, expressive of a single defence, and therefore unobjectionable. But the plea does not follow the statute; for the plea alleges that the invention was not "a new manufacture within this realm," and the statute speaks of "the sole working or making of any manner of new manufacture within this realm."

PATTESON J.—I am of the same opinion. I think the word "obtained," in the statute of *William*, applies to the person who has "obtained" the letters-patent from the crown; and I do not understand what the 1st section means by the words "assignee or otherwise" in the passage "that any person who as grantee, assignee or otherwise, hath obtained letters-patent," &c. may enter a disclaimer. In the 2nd section it is clear that the word "obtained" is applied solely to the original grantee of the letters, for it provides for the case of his turning out not to be the first inventor, when he *bonâ fide* believed himself to be so, and speaks of him as "such patentee," and adds, "or his assigns." The original grantee therefore being clearly the person who has "obtained" the letters-patent according to the use of the word "obtained" in the 2nd section, I do not see why the word should not have the same meaning in the 1st section. Indeed, I should think, even if it appeared that the grantee had parted with all his interest in the patent, he might still enter the disclaimer, if the attorney or solicitor general, whose permission is made necessary, should think proper to allow it. Here, however, it appears the party who entered a disclaimer had an interest in the patent to the extent of two-thirds.

With regard to the plea, I was at first in favour of Mr. *Cleasby's* argument that the plea contains one connected proposition and a single defence; but I see now that the words of the statute have not been followed; and I think the plea is ambiguous, and that the plaintiff might be put to difficulty in knowing how to meet it.

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COLERIDGE J.—The declaration appears to me to be good. The disclaimer has been made by the party who has “obtained” the letters-patent within the meaning of the statute. I think the words, “assignee or otherwise,” may be reconciled with our construction that the words, “the person who has obtained,” mean the original grantee, for the words “assignee or otherwise” may apply to a foreign invention, of which a party in this country may become the assignee, and be the first to obtain a patent in this country for it. With regard to the alleged inconvenience of allowing the patentee to disclaim at any time, although he has parted with his interest, it must be remembered that the sanction of the attorney or solicitor general is necessary to the disclaimer in the first instance, and, further, that a caveat may be entered against the disclaimer, and the propriety of allowing the disclaimer be fully considered.

I quite agree that the plea is bad : any one who had to advise, and say what was the defence set up by it, would be in difficulty.

WIGHTMAN J.—It is only by a forced construction that “obtained” in the statute can be taken to mean “possessed of.” The necessity of obtaining the sanction of the law officers of the crown before a party can disclaim, and the power of opposing the disclaimer by caveat, may obviate the inconvenience suggested.

I think the plea is ambiguous.

D.

Judgment for the plaintiff.



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Thursday,
Jan. 20th.

Held, that a town councillor was disqualified to be a relator on a motion for a quo warranto to question the validity of the election of another town councillor, he having been consulant of the objection before the election, been present at the election, and having afterwards administered to him without protest the declaration required by stat. 5 & 6 Will. 4, c.76, s. 50.

THE QUEEN v. GREENE.

RULE to shew cause why an information in the nature of a quo warranto should not be filed against *Richard Greene*, to shew by what warrant he claimed to exercise the office of councillor of the borough and city of Lichfield. The motion was made on the ground that *Greene* held a place of profit under the corporation at the time of his election.

The motion was made on the affidavits of the town clerk, and of *Stephen Brassington* the relator. The latter stated that he was a councillor as well as citizen and burgess of the city, that the election took place on the 2nd November, and that on the 6th November, before himself, he being such councillor, and *Robert Sharpe* another councillor, the defendant made and subscribed the declaration contained in and required by the Municipal Corporation Act.

The affidavit of the defendant stated, that he had announced publicly his intention to become a candidate for the office of councillor, and had circulated handbills announcing that intention, that the relator was necessarily informed thereof, and canvassed voters in the opposite interest, and was active in bringing them up to vote at the election on the 2nd November, and "was present at, and acquiesced in the same, and that afterwards, on the 3rd November, the election was declared and published with the knowledge of the said relator, by the alderman and assessors," and that the defendant afterwards made and subscribed the declaration of acceptance of office, as stated in the affidavit of the relator.

Sir *W. W. Follett* S.G. (with whom was *Willmore*) shewed cause. Any objection there may be to the validity of the defendant's election, the present relator, *Stephen Brassington*, is estopped from taking by his acquiescence in it. In *Rex v. Clarke* (a) Lord *Kenyon* said, that the Court will not

listen to "a corporator who has acquiesced, or perhaps concurred, in the very act which he afterwards comes to complain of." This rule has been constantly acted on by the Court. The relator was himself a councillor; he in that capacity administered the declaration to the defendant, who subscribed it before him; and those acts, which were perfectly voluntary, were done by him, after being present at the election, and being acquainted with all the circumstances of it. [He was then stopped by the Court.]

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Jervis and *Cole* contra. The cases which establish the principle that a concurrence prevents an impeachment of an election are all distinguishable from this. In *Rex v. Stacey* (a), one of the earliest cases, the real ground of the decision was that expressed by *Buller J.* "Where a person assents to an act, and derives and enjoys a title under it, it shall not be in his mouth to impeach it." In all the cases in which the relator has been held to be estopped, he has had some participation in the invalid election, so as to have placed himself in some degree in *pari delicto*; or, at all events, has distinctly acknowledged the validity of the election; *Rex v. Mortlock* (b), *Rex v. Symmons* (c), *Rex v. Cudlipp* (d), *Rex v. Clarke* (e), *Rex v. Trevenen* (f), *Rex v. Slythe* (g), and *Rex v. Parkyn* (h). He is not estopped by mere silence at the time of the election, nor by a recognition of its validity afterwards.

In this case all that was done by the relator was purely ministerial, and in the exercise of his duty; and it cannot be inferred from anything he did that he in any manner acquiesced in the validity of the election. It was his duty to administer the declaration under the 50th sect. (i) of the

(a) 1 T. R. 4.

(b) 3 T. R. 300.

(c) 4 T. R. 323.

(d) 6 T. R. 503.

(e) 1 East, 38.

(f) 2 B. & Ald. 339.

(g) 6 B. & C. 240; S. C. 9 D. & R. 226.

(h) 1 B. & Ad. 690.

(i) "That no person elected a mayor, alderman or councillor, or auditor or assessor for any borough

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Municipal Corporation Act. *Rex v. Iedgard* (a) shews that the office of the returning officer is ministerial, and that he has no power to inquire into the qualification of the candidates. He therefore would not be estopped by such participation, and à fortiori by the mere administration of the declaration a councillor would not.

Lord DENMAN C. J.—I think this is a good objection. The particular facts of the cases cited are not material, the question is one of principle. Can a man who has concurred in inducing another to exercise an office, be here heard to contest his right to fill it? I agree that a mere ministerial act is not an acquiescence, but that must be understood of acts which the party is required to do.

The case of *Rex v. Clarke* (b) has been much pressed upon us, but I think on examination it agrees with the view I take. Lord *Kenyon* there held that a person was not concluded from impeaching the defendant's title, by not having opposed his election to an office of magistracy, and by having attended corporate meetings, at which the defendant presided officially; but this he puts emphatically upon the ground of necessity. "There must," he says, "be magistrates, and the powers of government cannot stand still till the validity of a former disputed election is ascertained," and it appears that the objection was made at the time of the election, for the judgment proceeds: "In this instance, therefore, the relators having objected to the defendant's election to the office of an alderman at the time, I cannot think that their not having opposed his election since to a necessary office of magistracy is such an acquiescence in

shall be capable of acting as such, except in administering the declaration hereinafter contained, until he shall have made and subscribed before any two or more such aldermen or councillors (who are hereby respectively authorised and

required to administer the same to each other) a declaration in the words or to the effect following, (that is to say)," &c.

(a) 8 A. & E. 545; S. C. 3 N. & P. 513.

(b) 1 East, 38.

the original defect of his title, as precludes them from making this application within the time allowed by law." That judgment rests simply on the principle, that the alleged acts of acquiescence were necessary, and that raises a distinction which is quite satisfactory to me.

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PATTESON J.—The argument for the relator is put entirely on the 50th section of the Municipal Corporation Act. But that will not assist him, unless we construe it to make it obligatory on him to administer the declaration, and that he could not refuse or even remonstrate against doing so. Even if the act be merely ministerial, it is impossible to say he could not have demonstrated any objection he had to the person elected. Here the relator did not protest or object at all, and the defendant, by the act of the relator in a great measure, has been induced to perform those duties, the performance of which has rendered him liable to the penalties provided by the statute.

COLERIDGE J.—I am entirely of the same opinion. This case is within the principle of the authorities cited, that a party shall not be allowed to put the Court in motion, when he has concurred in the very act of which he complains. There is the making of the declaration; how came the defendant to make that declaration? The relator administered it. If he had no power to refuse, I agree there was no concurrence, but I think he had. If a mandamus had been moved for to compel him to administer it, I think the disqualification of the defendant would have been an abundant answer. I do not agree in the argument that if the relator had refused to administer the declaration the defendant would have been liable to a penalty, or that the office would have become by such refusal vacant.

WIGHTMAN J.—I agree in the general principle that a relator is disqualified who concurs in assisting the party

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to be capable of acting. Here the relator knows of the objection to the person elected, and nevertheless voluntarily takes a step which makes him capable of acting.

G.

Rule discharged without costs.

The QUEEN v. The Mayor, Aldermen, and Burgesses of .
 SANDWICH, (Ex parte MOURILYAN).

Monday,
 February 1st.

The town council of a borough under 5 & 6 W. 4, c. 76, s. 66, has jurisdiction to determine the whole claim to compensation of a borough officer, who has been removed from office, and may pronounce not only on the amount to which he is entitled, but whether his office, or the tenure of it, was such, as to entitle him to any thing.

2. Where therefore the council determined that a removed borough officer had no claim to any compensation whatever, and stated that, in case their decision should be overruled on appeal to the Lords of the Treasury, they reserved the right of disputing the amount of the claim, *held* that the council had not neglected to determine the claim so as to be bound to admit it, after the lapse of six months, under 5 & 6 Will. 4, c. 76, s. 66.

3. The Lords of the Treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged misconduct or otherwise; they have jurisdiction as to nothing but the amount of compensation.

SIR W. W. FOLLETT had obtained a rule to shew cause why a mandamus should not issue to the defendants, commanding them to prepare and execute a compensation bond to Mr. *Mourilyan*, conditioned for the payment of the sum of 7620*l.* 7*s.* 1*d.*

The following facts appeared upon the affidavits on which the rule was obtained. In July, 1831, Mr. *Mourilyan* was elected town clerk, which office he held until the 1st of January, 1836, when he was removed by the town council under the Municipal Corporation Act. During the time he held the office, he also executed, as incident thereto, the duties of clerk to the coroner, treasurer to the bridge fund liberty rate, and harbour fund, clerk, attorney and solicitor and law agent to the mayor and jurats as trustees of the harbour, attorney, solicitor and law agent to the corporation, and to the mayor for the time being as returning officer of the said town, port and borough, clerk to the court of record, clerk of the peace, and clerk to the magistrates,

according to the immemorial custom and usage of the said town, port and borough.

He was removed from office on political grounds, and not for any misconduct. On the 8th September, 1836, he delivered in to the town clerk a statement of the emoluments &c. received by him, distinguishing the particular office in respect of which they were received, for the five years before the passing of the act, and claimed 7620*l.* 7*s.* 1*d.*, as compensation for his loss of office. He was not called upon to attend any meeting of the town council, nor, as he believed, did the council at any time take the claim into consideration as to the amount thereof, but on the 1st of October, 1836, he received from the present town clerk a copy of the following *resolution of the council*: "That the council, considering the tenure by which the late town clerk held his office of town clerk, and the other circumstances of the case, are of opinion that his claim for compensation for the loss of such office and the other offices which he states to have been connected therewith is inadmissible, and that the council do hereby disallow the same accordingly, reserving to themselves full right, in case this decision shall be overruled on appeal, (which they cannot anticipate,) to investigate and dispute the statements on which such claim is founded."

On the 10th of March, 1837, he presented his petition of appeal to the Lords of the Treasury, wherein he stated that it appeared that his claim was disallowed on the ground of the tenure by which he held his office. Subsequently, on the Lords of the Treasury sending to the town council a copy of his petition, the council sent to the Lords of the Treasury a statement, in which their arguments were principally directed to the tenure of deponent's office, and in which were the words following: "The council beg, in the first place, to state to your lordships, that they did not proceed to consider the details of the said claim, being of opinion that the same was unfounded in toto, and incapable

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of being sustained, on the ground that the tenure by which the said *J. M.* held his office was not such as to create any title to compensation for the loss thereof, within the meaning of 5 & 6 *Will.* 4, c. 76, the said office having neither been held for life by the said *J. M.*, nor under such circumstances as to raise a just expectation that his office should continue for his life." The town council in this statement expressed their desire, in the event of the Lords of the Treasury determining against them on the principle of the claim, that they might have an opportunity of answering it in detail, and shewing it to be excessive. In March, 1838, at the request of the Lords of the Treasury, he furnished them with a statement of the particulars of the sums claimed under each head of office in each year, amounting to 2030*l.* 9*s.* 11*d.* for the five years in the aggregate, but at the same time stated that, as the town council had permitted the six months limited by 5 & 6 *Will.* 4, c. 76, s. 66, for an examination into the particulars of the claim, to expire without having made such examination, they were now concluded as to the amount of such claim, and that he was advised their lordships had no original jurisdiction, nor any power otherwise than upon appeal to examine into such amount, and that, the town council having refused all compensation on the ground of the tenure of his office, that, being the only subject of appeal, was the only subject for their lordships' determination. In November, 1838, their lordships having taken the whole case into consideration, both as regarded the tenure of the office, and the amount of the emoluments received by him, awarded him an annuity of 60*l.* for life.

The town council were willing to execute a bond to secure the above annuity.

From the affidavits in opposition to the rule, it appeared that the town clerk, by direction of the mayor, on the receipt of Mr. *M.*'s claim, sent a copy to each member of the council; that a few days afterwards, on the 27th Sep-

tember, the council met, and, after taking the claim into consideration, came to the resolution set out in Mr. *M.*'s affidavit. That the council came to the resolution, with reference to the tenure of the office in question, and the other circumstances of the case, and being of opinion that, as the compensation, if any due to him, was at most a trifling or nominal sum, it was better to disallow the whole claim. That the council, considering the total amount of the claim, under the various heads into which the same was divided, was exaggerated and excessive with reference to the tenure of the office, deemed it unnecessary to go into the figures to ascertain whether Mr. *M.* had made more or less profit from his offices than was set forth in his statement. That the council had considered it unnecessary to call Mr. *M.* before them, because they had sufficient means of considering his claim in his absence.

The affidavits differed in their statement as to the tenure of the office, but it appeared that, though there was an annual election, the same person had always continued in office for life.

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Kelly and *W. H. Watson* shewed cause (a).

Sir *W. W. Follett* S. G. and *Whitehurst* contra.

The substance of the argument sufficiently appears in the judgment of the Court. The cases cited were *Reg. v. Mayor &c. of Swansea* (b), *Reg. v. Mayor &c. of Carmarthen* (c), *Ex parte Lee* (d), *Reg. v. The Corporation of Warwick* (e), *Reg. v. Mayor &c. of Newbury* (f), *Rex v.*

(a) In Michaelmas term last, (Nov. 18), before Lord Denman C. J., *Williams, Coleridge* and *Wightman* Js.

(b) 11 A. & E. 66; S. C. 3 P. & D. 16.

(c) 11 A. & E. 9; S. C. 3 P. &

D. 35.

(d) 7 A. & E. 139; S. C. 2 N. & P. 63.

(e) 10 A. & E. 386; S. C. 3 P. & D. 439.

(f) 1 G. & D. 388.

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SANDWICH.*Mayor &c. of Bridgewater (a), Reg. v. The Lords Commissioners of the Treasury (b).**Cur. adv. vult.*

Lord DENMAN C.J. now delivered the judgment of the Court as follows:—This was a rule for a mandamus to the town council of the borough of Sandwich directing them to affix the common seal to a bond securing the sum of 7620*l.* 7*s.* 1*d.* to *John Mourilyan*, as a compensation for the loss of certain offices of profit under the corporation, from which he was removed upon the passing of the 5 & 6 *Will.* 4, c. 76.

It was not disputed that he had held these offices (among others that of town clerk) at the passing of the act, nor that he had been removed, and in due time sent in his claim for compensation and statement under the 66th section of the act. It was now contended on his behalf that upon the claim so sent in the town council had not within six calendar months come to any determination, and, therefore, that within one of the provisoes of the section "such claim was to be considered as admitted." This was denied on behalf of the town council, and raises the first and most material point in this case.

It appears from the affidavits that in September, 1836, *Mr. Mourilyan* sent in his statement and claim, amounting to the sum above stated, a copy of which was sent by the new town clerk to each member of the council, and in the same month the council was summoned by the mayor to meet, in order to consider and determine on them. *Mr. Mourilyan* was not called on in the interval for any explanation, nor was he summoned to be in attendance on the meeting, but on the day fixed the council met, took the matter into consideration, and after much discussion came to a resolution. [His lordship then read the resolution set out as above.]

(a) 6 A. & E. 339; S. C. 1 N. & P. 466.

(b) 10 A. & E. 374; S. C. 2 P. & D. 498.

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Soon after, but it does not appear precisely on what day, this resolution was communicated to Mr. *Mourilyan*, and he, acting under the impression which at that time prevailed generally, appealed to the Lords of the Treasury. This, however, he did not do until the 18th March, 1837, and in the proceedings on this appeal both parties raised before their lordships, and their lordships entertained, the question of Mr. *Mourilyan's* right to any compensation. In the result they were of opinion that Mr. *Mourilyan* was entitled to compensation; they thereupon went on to settle the amount of that compensation, and directed the town council to execute a bond for securing to him the sum of 60*l.* a year.

The council have always been ready to fulfil this award, but he is dissatisfied with it, and now insists upon his right to the full amount of his original demand as an admitted claim under the proviso above alluded to,

This rule cannot be made absolute in its present form, if the town council have determined on the claim in the first instance, because then it cannot be considered as having been admitted by them, nor can it be moulded into any other, if the Lords of the Treasury had jurisdiction to entertain that question, which was submitted to them by the present applicant himself; for, if they had jurisdiction, they have already decided, and decided finally, both on the right and the amount to which he is entitled.

Both these points, therefore, were discussed in the argument, and upon consideration we are of opinion that the council must be considered as having determined on the claim in Sept. 1836. It is quite clear that the claim, as submitted to the council, embraced, and could not but embrace, the question both of right and of amount, and, whatever may be thought of the nature of the jurisdiction of the Lords of the Treasury, it is equally clear that, in the first instance, the statute confers on the town council the right to enter into both questions. Such a right is necessarily implied from the fact that, in every case, in the first instance,

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both these questions must be involved in the claim made; the officer alleges his right to be compensated, and he states the amount to which by the calculations prescribed by the act he thinks he is entitled. This complex claim then is by the statute to be made to the council, and this of course they are to consider. But it is quite unreasonable on the one hand to assert that, if they deny the right, they thereby determine nothing, and so, by the operation of the proviso, at the end of six months, admit the amount, in effect admit the whole claim, including therein that which they have denied; or, on the other hand, that, if they deliberate on and deny the right, they must still go on to ascertain contingently the amount, when it may well be that the very question of amount may be affected by the reasoning and grounds on which they decide against the right; so that, if they should turn out to be wrong in the latter, it may be necessary for them to reconsider their decision as to the former. The language of the section is quite clear, that the whole claim must come before them in the first instance; and, as we have before observed, that claim presents two matters for their consideration—if they decide in favour of the applicant as to the right, it becomes necessary to go on to consider the amount, and in that case a neglect to proceed further to that consideration would bring the case within the proviso, but an adverse decision on the right amounts to a determination on the whole claim—it in fact disposes of the whole. The solicitor-general was driven therefore to contend that the council had nothing to do but with the amount, and, if that were conceded to him, it would certainly follow in this case that they had done nothing, for they admit that they did not enter into any consideration of that matter; but we are satisfied that there is no foundation for this argument, and consequently that this rule cannot be made absolute in the terms prayed.

The question which next arises, and which was argued very fully, is whether the Lords of the Treasury had any

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jurisdiction to decide on the question of the right. In two cases, the *Warwick* and *Newbury*, where the applicant had been continued or reappointed and then dismissed from his office, we have held that they had not; that their jurisdiction was confined to settling disputes as to the amount; and, although the applicants had there been themselves the parties to bring the question of right before them, we did not think them thereby precluded from agitating the same question before this Court, which we have held to be the only proper tribunal to decide it; on the one hand those decisions are said to govern the present, on the other not to apply, but to be confined to cases arising under the last proviso in the section; and upon this point we have entertained some doubt. But upon consideration we think there is the same limit to the appellate powers of the Lords of the Treasury under both parts of the section; the principle, on which we held that they were restrained to the question of amount in cases under the concluding proviso, equally applies to cases in the earlier part of the section, though there are some differences in the circumstances; but questions of law and fact as difficult and complicated may arise under the latter as under the former. Nor do the words of the section point to any distinction in this respect, indeed all the same provisions and detail which are enacted in the former part of the section, and none other, must be considered as incorporated and re-enacted in the proviso.

We come to the conclusion, therefore, that the writ cannot issue in the terms prayed for, because the claim cannot be taken to have been admitted by the town council; but, as the Lords of the Treasury had no jurisdiction to consider the question of right, we think there are materials for moulding the rule, and that the writ may issue to the town council commanding them to make compensation generally: to this, if they please, they may make a return, and bring before us the question of right, which has not been discussed by either party in the present argument; or, if they

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should choose to obey, and award Mr. *Mourilyan* the same sum which the Lords of the Treasury have already awarded him, he may, if he shall be so advised, appeal to their lordships in the hopes of procuring a decree for a larger amount.

Rule absolute for the town council
to award compensation.

D.

Friday,
Jan. 21st.

HINTON v. DIBBIN and others.

The 1 Will. 4, c. 68, s. 1, protects a carrier from liability even for gross negligence in respect of silks and the other goods therein enumerated, above the value of 10*l.* unless, at the time of their delivery to the carrier, their value and nature is declared, and an agreement entered into to pay the extra charge for them, as provided by section 2,

THE declaration stated that the defendants before and at the times hereinafter next mentioned were, and from thence hitherto have been, common carriers of goods and chattels for hire from London to Calne, in the county of Wilts, and thereupon certain persons, to wit, Messrs. *Springfield &c.* heretofore and before the commencement of this suit, to wit, on &c. at the office of the defendants at Gerard's Hall, Basing Lane, in the city of London, on behalf of the plaintiff, caused to be delivered to the defendants, and they then accepted and received from Messrs. *Springfield &c.* on behalf of the plaintiff two parcels or bales containing &c. to wit, 5000 yards of silk of the plaintiff &c. to wit, of the value of 500*l.*, to be safely and securely carried and conveyed by the defendants from London to Calne, and there at Calne safely and securely to be delivered to the plaintiff for a certain reasonable reward &c. Yet the defendants, not regarding their duty as such common carriers, did not nor would safely or securely carry or convey the said parcels or bales and their contents aforesaid from London to Calne, nor there at Calne safely or securely deliver the same to the plaintiff, but, on the contrary, the defendants so conducted themselves in the premises, that by and through the *misfeasance, gross negligence and wrongful conduct* of the defendants, and not otherwise, one of the said parcels or bales, and the contents of the same, being &c.,

to wit, of the value of 250*l.*, afterwards, to wit, on &c., became and were wholly lost to the plaintiff &c.

Plea. That after the passing of a certain act, &c. (1 *Will.* 4, c. 68), and before and at the time of the delivery to them of the said two parcels, the defendants were common carriers of goods and chattels by land for hire, by a certain public conveyance, to wit, a van, from London to Calne, and the defendants had also before and at the time of the delivery of the said two parcels, in pursuance of the said act, notified, published and stated in and by a notice—affixed in legible characters in a public and conspicuous part of the said office, where the said two parcels were delivered to them, that is to say, in a public and conspicuous part of their office at Gerard's Hall, Basing Lane, in the city of London aforesaid, and at which office parcels then were and still are received by them for the purpose of conveyance by their said van, and in which said notice there was then and there, in such legible characters as aforesaid, notified, published, stated, and set forth the increased rates of charge required by them to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of the articles in the said act of parliament and notice specified and mentioned, and which said notice was and is as follows, that is to say,—“ In pursuance of an act of parliament passed in the first year of the reign of his Majesty King *William* the 4th, cap. 68, intituled, ‘ An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof,’ notice is hereby given, that for any package or passengers’ luggage, containing &c. (enumerating the various other excepted articles in the first section of the act, and silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials,) or any of them, to

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a greater amount in value than ten pounds, the increased rates of charge, over and above the common and ordinary rate of charge for carriage, are as follows. (Then followed the charges.)

That the plaintiff, before and at the time of the delivery of the said parcels to the defendants, had notice of the premises, and the said increased rates of charge so required to be paid by the notice were due and reasonable and proper rates of charges in that behalf. That at the time of the delivery to them of the parcels to be carried for hire by the said public conveyance as aforesaid, and continually from thence until the loss in the declaration mentioned, there was contained in the parcels certain articles and property of the description in the said act of parliament and notice mentioned, that is to say, silk in the said declaration mentioned, and no other article or property whatsoever, and that the value of the articles and property contained in each of the said parcels respectively then and during all the said time aforesaid, far exceeded the sum of 10*l*. That at the time of the delivery of the said parcels to the defendants at the said office as aforesaid, for the purpose of being carried as aforesaid, the value or the nature of the said articles and property so contained in the said parcels as aforesaid, was not nor were they at any other time whatsoever declared by the plaintiff or by the person sending and delivering the same to the defendants or to the person receiving the said parcels on their behalf, nor was the said increased charge so mentioned and contained in the said notice as aforesaid, or any engagement to pay the same then or any other time whatsoever, offered or tendered to or accepted by the defendants, or the person receiving the said parcels, or any other person or persons whatsoever on their behalf. Verification.

Replication. That the defendants did not use due diligence in and about the carrying and conveying the goods and chattels in the declaration mentioned to have been delivered to them for the purpose in the declaration men-

tioned, but on the contrary thereof that the defendants, as such carriers as aforesaid, were in and about the premises guilty of *such gross and culpable negligence and wrongful and improper conduct*, that by and through their gross and utter neglect, wilful default, and entire and absolute want of care and caution in the premises, and not otherwise, the said bale was lost as in the declaration mentioned. Verification.

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Rejoinder. That at the time of the delivery to them of the parcels or bales in the declaration mentioned the defendants were the proprietors of the public conveyance in which the same were to be carried and conveyed from London to Calne; and the parcels or bales were delivered to them to be carried and conveyed in the usual and ordinary course of business. That soon after the delivery thereof, that is to say, on the day and year in the declaration mentioned, the defendants, in the due and usual and ordinary course of business, safely and securely delivered the parcels or bales to certain servants then in the employ of them the defendants as such common carriers as aforesaid, to wit, to *A.* and *B.*, who then and from thence until and at the time of the loss in the said declaration mentioned, had the care and conduct of the said public conveyance, in which the parcels or bales were to have been carried and conveyed from London to Calne, and which parcels or bales were then, to wit, at London, safely and securely placed and deposited in the said public conveyance in order to be carried and conveyed as aforesaid, and the bale or parcel in the declaration mentioned to have been lost was lost thereout and therefrom in the course of the journey of the public conveyance from London towards Calne, and whilst the same was under the care and conduct of the said servants of the defendants. That the want of diligence, negligence, and wrongful and improper conduct, neglect, default, and want of care and caution in the declaration and replication to the plea mentioned, were not nor was any part thereof the *personal want of diligence, negligence, wrongful, or*

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improper conduct, neglect, default, or want of care and caution of *the defendants* or any or either of them, but was the want of diligence, negligence, and wrongful and improper conduct, neglect, default, and want of care and caution of the said servants so in the employ of the defendants as such common carriers as aforesaid, and who so had the care and conduct of the said public conveyance at the time of the loss of the said parcel or bale as in the said declaration mentioned Verification.

General demurrer and joinder.

The case was argued in Michaelmas term last (a) by

Erle in support of the demurrer, and

Sir *W. W. Follett* S. G. contra.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—The declaration in this case states the defendant to be a common carrier for hire, and that the goods in question (silk) were lost “by the misfeasance, gross negligence, and wrongful conduct of defendant as such carrier.” Plea, that defendant being a carrier, after the passing of 1 *Will.* 4, c. 88, caused to be duly published a notice of the increased rate of charge for the articles in the said act and notice specified (silk included), that the silk was above the value of 10*l.* the nature of the article not declared, and that no payment was made or engagement to pay tendered. Replication, that defendants, *as such carriers*, were guilty of such gross and culpable negligence and wrongful and improper conduct, that by their gross and utter neglect, wilful default, and entire and absolute want of care and caution the said silk was lost. Rejoinder, that the silk was entrusted by defendants for carriage to certain servants (naming them), that the same was lost when under the care

(a) Nov. 12th, before Lord Denman C. J., *Williams*, *Coleridge* and *Wightman* Js.

and conduct of such servants, negating any want of diligence or care in defendants themselves. To this there is a general demurrer.

Upon this state of the pleadings the question for our decision (as admitted in the argument on both sides) is whether, since the passing of the said act, a carrier is liable for the loss of goods therein specified by reason of gross negligence. For although in the declaration the word "misfeasance" is used, which, in some cases, as will be seen hereafter (and especially in *Sleat v. Fagg* (a) and *Owen v. Burnett* (b)), is understood as implying conduct in the carrier distinguishable from negligence, conduct which (in the language of Lord *Ellenborough* in *Beck v. Evans* (c)) "divests him wholly of the character of a carrier," yet in the replication the expression is dropped, and the conduct attributed to the defendants is negligence *as carriers* and that only. In putting an interpretation upon this statute for the first time we necessarily feel the case to be one of considerable importance, both because it is the first, and also because it regards a subject upon which much doubt and uncertainty have existed, making it expedient therefore that the question should be finally settled. In deciding upon this statute we must of course be regulated by its language, and the state of the law, at the time of its passing, is material only so far as it enables us to discover the mischief for which it was intended to apply a remedy. But in that point of view it may be useful to consider the actual position of carriers with respect to liability for the loss of goods, notwithstanding the notices, to restrict that liability, which had been for some time almost universally adopted. In the first place then it had been decided by all the courts that a carrier is liable for the loss of articles above the amount mentioned in the usual notice, though not paid for accordingly, where he is guilty of what in so many cases is called "gross negligence." This was the precise point

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(a) 5 B. & Ald. 342.

(c) 16 East, 244.

(b) 2 C. & M. 353.

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decided in the Exchequer in the case of *Bodenham v. Bennett* (a), a case often cited and relied on in support of this doctrine. There the usual notice had been given, and the parcel lost was of much greater value than the sum mentioned in that notice. The like decision took place in the Court of Common Pleas, under similar circumstances, in the case of *Smith v. Horne and others* (b), the chief justice reporting that the only question submitted to the jury was whether the carrier had been guilty of gross negligence, and that direction was sustained by the Court. And in this Court also, in the case of *Birkett v. Willan and others* (c), a new trial was granted expressly upon the ground that Lord Tenterden had omitted to inform the jury that the carrier would be liable for gross negligence, though in that case also the usual notice was proved, and the value of the goods lost much exceeded the amount therein specified. It is true that in the case of *Batson v. Donovan* (d), where a parcel of bankers' notes, of the value of 4000*l.* and upwards, was delivered to a carrier without any communication of its contents, the learned judge who tried the cause left two questions to the jury, the first being "whether the plaintiffs dealt fairly by the defendants in not apprising them that the box contained articles of value," and the verdict found for the defendants upon that direction was supported. But the Court was not unanimous in the decision, and the dissenting judge differed mainly because he considered the leaving such preliminary question in favour of the carrier to be a novelty and unwarranted by any authority. And in the cases already mentioned (there being many others to the same effect) no such point was made, but the only question was whether there was gross negligence in the carrier. In a subsequent case in this Court, *Sleat and others v. Fagg* (e), the carrier was held liable for the loss of a parcel of great value, notwithstanding the

(a) 4 Price, 31.

(d) 4 B. & Ald. 23.

(b) 8 Taunt. 144.

(e) 5 B. & Ald. 342.

(c) 2 B. & Ald. 356.

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usual notice by him and want of notice to him. That case undoubtedly was decided chiefly upon the ground of misfeasance, as before explained. But, as it was impossible to impute to the carrier a wilful purpose of destroying or losing the parcel, it seems difficult to distinguish the case *in kind* from others where negligence, more or less in amount, has been the cause of the loss, and the carrier has been held liable accordingly. It surely bears no resemblance to the instance of "misfeasance" put by Mr. Baron Bayley in the case of *Owen v. Burnett* (a), which is "dashing a package of glass against the ground." At all events such a case may well be supposed to have been in the contemplation of the legislature, when passing the act expressly for the purpose (as we shall see presently) of relieving carriers from responsibility. Again, when we find "gross negligence" made the criterion to determine the liability of a carrier who has given the usual notice, it might perhaps have been reasonably expected that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted whether between "gross negligence" and negligence merely, any intelligible distinction exists. But, without negligence of some kind, it is not very easy to suppose how a loss for which the carrier is liable can take place, and, if so, his protection from the notice before the statute was of a very precarious description. In the before cited case of *Owen v. Burnett* (a), Mr. Baron Bayley thus expresses himself. "As for cases of *what is called* 'gross negligence,' which throws upon the carrier responsibility from which but for that he would have been exempt, I believe that in the greater number of them it will be found that the carrier was guilty of 'misfeasance.'" From this language of the learned judge, it is difficult to understand him otherwise than as not being satisfied as to the meaning

(a) 2 C. & M. 353.

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and import of the words, or the effect attributed to them, to fix the carrier with liability. The latest case bearing upon this part of the subject, the state of the law at the time of passing the act, is that of *Wyld v. Pickford and others* (a), that act, it must be observed, not having been at all under the consideration of the Court. In a prepared judgment however delivered by Mr. Baron Parke, there are the following observations. "Upon reviewing the cases on this subject, (what circumstances may make a carrier responsible after the usual notice), the decisions and dicta will be found not altogether uniform, and some uncertainty still remains as to the true ground on which cases are taken out of the operation of these notices. In *Bodenham v. Bennett* (b) Mr. Baron Wood considered that these notices were introduced to protect carriers from extraordinary events, and not to exempt them from due and ordinary care; on the other hand, in some cases it has been said, that the carrier is not by his notice protected from the consequences of misfeasance, Lord Ellenborough in *Beck v. Evans* (c), and, that the true construction of the words 'lost or damaged,' in such notices is, that the carrier is protected from the consequences of negligence and misconduct in the carriage of the goods, but not if he divest himself wholly of the charge committed to his care, and of the character of carrier." "In many other cases it is said that he is still responsible for gross negligence, but in some of them that term has been defined in such a way as to mean ordinary negligence (d), that is the want of such care as a prudent man would take of his own property." "The weight of authority seems to be in favour of the doctrine that, in order to render a carrier liable after such a notice, it is not necessary to prove a total abandonment of that character, or an act of wilful misconduct, but that it is enough to prove an act of ordinary negligence, gross negligence in the sense in which it has been understood in the last mentioned cases."

(a) 8 M. & W. 460.

(c) 16 East, 244.

(b) 4 Price, 34.

(d) Story on Bailments, s. 11.

The result of these preliminary remarks is that, supposing (as the title of the act imports) protection to carriers to have been the object of the legislature, there was a good deal of doubt and uncertainty, if not of hardship, to be removed by the act, and that there is no reason *à priori* why a more limited construction should be put upon it than the language itself requires.

The title to the act (which is not to be disregarded in putting a construction upon it) "is for the more effectual protection of mail contractors, and other common carriers for hire, against the loss of, or injury to, parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof." The protection, it is to be noticed, is absolute and without reserve, in the case supposed of not notifying the contents. The preamble (in substance) first recites "that by reason of the frequent practice of bankers and others sending by public conveyances by land, for hire, parcels and packages containing articles of great value in a small compass, much valuable property is rendered liable to depredation, and the responsibility of such common carriers (as in the act before mentioned) is greatly increased," and further, "that through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents, so as to enable such carriers to protect themselves against losses, and the difficulty of fixing parties with knowledge of notices published to limit their responsibility they have sustained heavy losses."

The grievance therefore first mentioned is the sending packages of value without communicating the contents, and not merely the difficulty of proving knowledge of notices by owners of goods.

It is then enacted, that no such common carrier shall be liable for the loss of, or injury to, any property therein specified (including silks) above the value of 10*l.*, unless at the time of the delivery thereof at the office, warehouse or receiving house of such carrier, or to his servant, for the

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purpose of being carried, the value and nature of such property shall have been declared, and such increased charge as thereafter mentioned, or an engagement to pay the same, be accepted by the person receiving such property.

By the 1st section therefore, thus briefly abstracted, the exemption of the carrier from liability is absolute and complete, unless the preliminary thereby made indispensable is complied with by the owner of the goods.

The "increased charge" is by the 2nd sect. declared to be, what the carrier is entitled to receive over and above the ordinary rate of carriage for the conveyance of the species of property before enumerated, when above 10*l.*, such increased rate of charge to be notified by some notice to be affixed in some conspicuous part of the office, warehouse or receiving house, where goods are received for carriage.

By section 4 it is provided, that no public notice or declaration shall exempt any carrier from his liability at common law for the loss of, or injury to, any articles other than those in the 1st section enumerated, but that, as to such other articles, his liability as at common law shall remain notwithstanding such notice. From which exception as to the liability of the carrier in respect of goods not enumerated, it seems impliedly to follow, that, as to those which are, protection is afforded to him in the manner above set forth.

By section 8 it is enacted that nothing in this act shall be deemed to protect such carrier from the felonious acts of any servant in his employ, nor to protect such servant from liability for any loss or injury by his own personal neglect or misconduct. The former branch of the clause is, to say no more, at least consistent with the supposition, that for conduct short of felony the carrier is no longer liable, whereas it is obvious that before the passing of the act the carrier would have been liable for acts of the servant, not amounting or approaching to felony—negligence. The latter branch seems to have been introduced *ex abundanti cautela* merely, seeing that there is nothing in any part

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of the act to vary the liability of the servant to the master, for any misconduct of the former.

Upon the whole the language of the 1st section seems to us to be perfectly clear and unambiguous, without exception or restriction, and that none can fairly be implied from any other part of the act. By holding the carrier exempt from liability as to the enumerated articles, unless the owner shall declare their nature, and pay for them in the manner prescribed, we not only further the object avowed in the title and preamble of the act, but give it the effect of removing doubts and difficulties, which (as we have seen) it is admitted did exist as to the liability of a carrier for the loss of goods, who has sought to limit that liability by the publication of a notice in the usual form.

It remains only to advert to the case of *Owen v. Burnett* (a), upon which much reliance was placed in the course of the argument, not for the sake of the decision, but the language of two of the learned judges, who are supposed to have intimated an opinion, that, although the article damaged was amongst those enumerated in the act, the carrier would still have been liable for the damage, if guilty of "gross negligence." Mr. Baron *Vaughan*, in giving judgment for the defendant, is reported to have said, "if gross negligence were made out, it would be different." Mr. Baron *Bayley*, the other judge referred to, does not in terms so express himself, nor is what he says necessarily equivalent, and we have before taken occasion to observe upon the manner in which in the same case he speaks of "gross negligence." But, supposing it to be so, the observation is wholly extrajudicial, and unnecessary for the decision of the case. That decision is in favour of this defendant; for it was expressly found by the jury that the loss was occasioned "by the negligence of the carrier alone," and yet the judgment was in his favour. Moreover, in this same case, the Court shewed a disinclination to limit the operation of the statutes. For whereas in the preamble mention is made of valuable packages "in a small compass," and thence an argu-

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ment was urged, that to such only could the act be applicable, the Court held the contrary, and that it did apply to a package, which is stated in the case to have been of "considerable size." In no other case has the question now before us been even noticed.

We are therefore unfettered by any authority in putting that construction upon the statute, which we think it requires, and our judgment must be for the defendants.

D.

Judgment for the defendants.

Saturday,
Jan. 29th.

THORNE and another v. NEALE.

The stat. 1 & 2 Vict. c. 110, s. 9, which regulates the mode of taking cognovits and warrants of attorney, does not apply to the case of a consent in writing, by a defendant, that a judge's order may be obtained to permit the plaintiff to sign judgment unless the debt and costs are paid within a certain time.

PETERSDORFF had obtained a rule to shew cause why a judge's order and judgment signed in pursuance of it should not be set aside. The defendant had signed a consent to a judge's order, that, if the debt and costs were not paid by a certain day, judgment might be signed against him. The defendant made default, and judgment was signed, which by this rule it was sought to set aside, on the ground that the consent was not attested by an attorney acting in behalf of the prisoner, in the manner required by the statute 1 & 2 Vict. c. 110, s. 9.

H. Hill shewed cause. There are two recent cases in the Court of Exchequer, which are expressly in point, and decide that a consent given by a defendant to a judge's order for a conditional signing of judgment, is not within the statute: *Bray v. Manson* (a), *Baker v. Flower* (b).

Petersdorff contra.

The COURT (c), on the authority of these cases, held that there was no technical objection to the validity of these proceedings, and, no fraud being shewn, discharged the rule.

G.

Rule discharged without costs.

(a) 8 M. & W. 668.
(b) *Ib.* 670.

(c) Lord Denman C. J., *Patterson* and *Coleridge* Js.

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**The QUEEN v. The Directors of the LONDON and
SOUTH-WESTERN RAILWAY COMPANY.**

*Saturday,
June 4th.*

THE defendants, in and by a certain rate, made for the relief of the poor of the parish of Mitcheldever, in the county of Southampton, on the 6th November last, were rated on the sum of 4320*l.* as under, viz. "London and South-Western Railway Company; railway, four and a half miles, 4320*l.*" Upon appeal duly made against the said assessment, the quarter sessions confirmed the rate, subject to the opinion of the Court on the following case:

The London and South-Western Railway Company are established and act under a certain act of parliament, passed in the fifth year of the reign of his late majesty King *William* the Fourth, entitled, "An Act for making a Railway from London to Southampton," and four other acts of parliament, respectively passed in the first, second, and fourth years of the reign of her present Majesty, and respectively entitled, "An Act to alter the Line of the London and Southampton Railway, and to amend the Act relating thereto;" "An Act to amend the Acts relating to the London and Southampton Railway Company, hereafter to be called the London and South-Western Railway Company, and to make a Branch Railway to the Port of Portsmouth;" "An Act to amend the Acts relating to the London and South-Western Railway Company;" and "An Act to amend the Acts relating to the London and South-Western Railway Company, and to authorise an Agreement between the said Company and certain Inhabitants of Wandsworth and

The amount on which a railway, when the railway Company are themselves the carriers, is to be assessed to the poor-rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the Company from the conveyance of passengers, cattle, and goods under the powers of their acts, such lessee finding locomotive power, carriages, &c. and paying all expenses incidental to working the railway, free of all usual tenant's rates and taxes, and tithe commutation rent charge, and making allowance and

deductions for the average annual cost of repairs, insurance and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent.

And this principle applies, though the railway acts contain clauses that, if themselves are the carriers, they shall keep an estimate or account of the tolls which would be payable on the same amount of traffic, supposing it to be conducted by other parties, and that they shall, under heavy penalties, allow the parish officers to have access to such account or estimate.

With regard to the rating in a particular parish, the line is to be rated not in the proportion which the length of the line therein bears to the whole line, but in the proportion that the receipts in such parish for traffic bear to the receipts throughout the whole line.

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Battersea, respecting an alleged Loss in their Supply of Water." Copies of these acts accompany this case, and are deemed to constitute part thereof, and may be referred to by the Court, or either party, at the hearing thereof.

Under the powers contained in these acts, or of one of them, the Company have formed and completed a line of railway from Vauxhall, in the county of Surrey, to Southampton, being a length of 77 miles, and this railway for $4\frac{1}{2}$ miles thereof, passes through the parish of Mitcheldever aforesaid, and in pursuance of the powers and provisions of the acts, especially those contained in the 150th to the 161st section of the first mentioned act, the Company have caused lists to be made of the several rates, tolls and sums, which the Company have appointed to be taken and received by virtue of the said first mentioned act. And the said Company have duly kept, and do duly keep, a separate account, shewing the amount of rates or tolls which would have been received by them for the use of the said railway, in respect of passengers, cattle or other animals, goods, wares, &c. if carried by any other party or parties, to which said account the overseers of the poor of the several parishes and townships through which the railway passes, have free access, and have liberty to inspect, in manner by the said act provided.

The sum which should have been so received by the Company for the use of the railway from such other parties, in the year next immediately before and up to the time of the making of the said rate, in respect of so much of the railway as lies in the said parish, amounts to 3470*l.* 13*s.* 9*d.*, being such portion of the tolls as is earned by the Company in the said parish of Mitcheldever.

The whole sum, however, received by the Company for the conveyance of passengers, &c. by the Company, in carriages provided, manned and worked by the Company, at their own sole expense, including the said sum of 3470*l.* 13*s.* 9*d.*, amounts to 13,880*l.* per annum, in respect of so much of the railway as lies in the said parish.

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The former sum of 3470*l.* 13*s.* 9*d.* constitutes the proportionate sum for the said parish, which any individual who contracted with the Company for the exclusive right to take tolls for the use of the railway, from persons using the same, under the powers and subject to the regulations of the aforesaid statutes, for the transmission of goods, cattle, and passengers, along the line, in carriages provided by such persons, would receive from such persons; and the sum of 1293*l.* constitutes the rent which a tenant from year to year would give to the Company for the exclusive right to receive tolls for the conveyance of goods, cattle and passengers in the manner mentioned in section 157 of the said first-mentioned act, along so much of the railway as lies in the said parish, free of all usual tenant's rates and taxes, and tithe commutation rent charge, and making all deductions for the average annual cost of repairs, insurances, and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent.

The respondent parish contends that the annual value is not to be estimated on the basis of the tolls alone, nor is to be limited to such tolls or their value. But that the advantage which a lessee of the railway may be expected to derive from his lease by supplying power and by carrying upon it may be taken into account.

That if a lessee is to be supposed capable of deriving from the use of the railway all the profits which now accrue to the Company from the conveyance of passengers, cattle and goods, under the powers of their acts, such lessee finding locomotive power, carriages, &c., and paying all expenses incidental to working the railway, then the whole railway, with its fixtures and appurtenances, might be reasonably expected to let from year to year at a rent which, for the purposes of this rate, may be assumed at 70,000*l.* per annum at the least, free of all usual tenant's rates and taxes, and tithe commutation rent charge, and making allowance and deductions for the average annual cost of repairs, insurance, and other expenses necessary to maintain

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the way, its fixtures and appurtenances, in a state to command such rent.

That supposing such rent to be given for the whole line, the proportion thereof, in respect of so much of the railway as lies in the respondent parish, is to be assumed to be the net sum of 4320*l.* per annum, being the amount at which the appellants were rated in the above rate.

The questions for the opinion of the Court are—

Whether the Company are rateable upon the principle contended for by them, or upon that contended for by the parish; that is to say,

Whether, upon an estimate of the net annual value, obtained from the statement of the tolls, which would be received by the Company as aforesaid, forming the basis of the rent which a tenant would give as before mentioned, subject to proper deductions, or upon an estimate of the net annual value, as ascertained by a rent given by a tenant under the circumstances and for the purposes above stated, as contended for by the parish.

Lastly, whether the annual value upon which the parish rate is to be made, should be such proportion of the estimated rateable value of the whole line (whichever basis is adopted by the Court) as the length of the part situate in the parish bears to the whole line, or such proportion thereof as the receipts actually derived from or in respect of the carriage of passengers, cattle and goods, or from tolls, upon so much as lies in the parish bear to the same receipts throughout the whole line.

If the rateable value is to be proportioned to the length of the railway in the parish, and not to the receipts, then the estimate, as contended for by the Company, should be the sum of 1400*l.*

If it is to be proportioned to the receipts as above, and not to the length of the railway in the parish, then the estimate, as contended for by the parish, should be 3800*l.*

The rate is to be confirmed, quashed, amended, or sent to be reheard by the sessions, according to the opinion of the Court upon the above points.

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Sir *W. W. Follett* S. G., *Cresswell* and *Smirke* in support of the order of sessions(a). The real question to be decided in this case is, whether the Company is to be rated only in respect of the tolls which they would be entitled to receive if the carrying trade were conducted by other persons, or whether they must be rated in respect of that sum which would be paid as rent of the railway for the privilege of standing in the same position as the Company, and having those advantages of conducting the carrying trade which the Company necessarily possess from the nature of that trade when conducted upon a railway.

The legislature contemplated the user of the railway by other parties besides those constructing the railways—by parties employing their own locomotive engines, and from such parties the Company were entitled to receive certain tolls. This was one mode in which the defendants might get money for the use of their railway. Another mode was by the defendants themselves providing locomotive power and becoming carriers. This mode was also contemplated by the legislature.

(a) Saturday, Jan. 15th, and Wednesday, 19th, before Lord Denman C.J., *Patteson*, *Coleridge* and *Wightman* Js.

It was scarcely disputed that one point raised by the case was untenable, viz. that the rating must be upon the proportion which the length of railway in the parish bore to the whole line, and not upon the amount of the earnings in the parish. *Rex v. Kingwinford*, 7 B. & C. 236 : S. C. 1 N. & M. 20; *Rex v. Woking*, 4 A. & E. 40; S. C. 5 N. & M. 395. And the following passage in *Rex v. Bristol Dock Company*, 1 G. & D. 76, was cited: "Since the decision of the case of *Rex v. Nicholson*, 12 East, 330, and *Williams v. Jones*, 12 East, 346, the principle upon which the rate upon tolls is to be imposed has

been fully established, though the application of that admitted principle to each particular case may not always be easy. It is this, that the tolls are rateable as profits of land occupied within the parish for which the rate is imposed; and agreeably to it water companies have been rated (*Rex v. Corporation of Bath*, 14 East, 621); so also gas light companies (*Rex v. Birmingham Gas Light Company*, 1 B. & C. 506 : S. C. 2 D. & R. 735); and canal companies (*Rex v. Woking*, 5 N. & M. 395; S. C. 4 A. & E. 40). In all these cases, and in many others to which in a matter not now to be disputed it is not needful to refer, the rate is imposed in respect of profits arising within the parish."

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Of the general principle governing the assessment of poor rate there can be no doubt; whether the owner be himself the occupier of the property, as in this case, or whether he let it to another person, the rate is to be imposed upon the value of the rent which a solvent tenant would pay for such occupation in order to carry on business there: *Rex v. Birmingham Gas Light Company* (a), *Rex v. The Oxford Canal Company* (b), *Rex v. The Trustees of the Duke of Bridgewater* (c), *Rex v. Tomlinson* (d), *Rex v. Lower Milton* (e). In *Rex v. The Trustees of the Duke of Bridgewater* (c) Bayley J. said, in giving judgment, "We have no doubt that the trustees must be rated as occupiers of land, and that the same principle of rating must be adopted whether the party be owner and occupier, or occupier only. If land be occupied by a person as a farmer, the value of the occupation is the rent paid by him for it." It is clear then, by the general law of the land, this railway is liable to be rated according to the sum which a tenant would pay for it, in order to have the privilege of conducting a carrying trade. It is indeed said, that qua carriers they stand only in the same position as any other of the public, who should think proper to run engines and carriages on the line, but that is not so. In point of fact it is notorious that the carrying trade can be conducted only by those persons who have the stations, and other conveniences provided by the Company on the land. The land is the subject of the rate, and, in the estimation of its value, houses, shops, and other buildings on it, must be taken into consideration: *Rex v. Liverpool Exchange* (f), *Rex v. Guest* (g), *Rex v. Cambridge Gas Company* (h). There is, then,

(a) 1 B. & C. 506; S. C. 2 D. & R. 735.

(b) 4 B. & C. 74; S. C. 6 D. & R. 86.

(c) 9 B. & C. 68; S. C. 4 M. & R. 143.

(d) 9 B. & C. 163; S. C. 4 M. & R. 169.

(e) 9 B. & C. 810; S. C. 4 M. & R. 711.

(f) 1 A. & E. 445; S. C. 3 N. & M. 550.

(g) 7 A. & E. 951; S. C. 2 N. & P. 663.

(h) 8 A. & E. 73; S. C. 3 N. & P. 462.

the land on which the iron rails are laid, and there are the stations erected for the purpose of managing the passengers and luggage traffic, and adapted therefore for the carrying trade: how then can it be doubted, that upon the rent which a tenant would give for the use of the land with the iron rails laid on it, and of the buildings used as stations, the rate must be assessed? It is indeed true that a power is given to the public to run their own engines and carriages upon the line, and thereby to conduct a carrying trade. Even conceding that under existing circumstances that is an available power, it does not affect the question; it is a privilege which, if available, diminishes the value of the right of the Company, and which would equally diminish the value of the railway to a lessee, but it does not make the rent less the test of rateability, though the privilege would, if available, decrease the rent which a tenant would be disposed to pay. Suppose the Company were in fact to demise their stations and the railway, and put the lessee in the same position as themselves as to the right of carrying, but reserving to themselves the right to receive the tolls in respect of any other carrying by strangers, surely the rent so paid, as well as the value of the tolls received, must be taken on which to found the estimate of the amount of the rate to be imposed.

The Company have, under the powers conferred upon them by the legislature, invested their capital in land, and thereby improved its value in a particular manner; for the improved value a tenant would give a consideration as rent, and why is the general principle to be departed from, that that rent is to be taken to determine the amount of the rateability?

There is certainly no difficulty in the Company demising their land with their privileges to a third party. They are expressly empowered to demise the tolls (a), and the fee

(a) By sect. 108, "And be it further enacted, that it shall be lawful for the said Company by writing under their common seal, from time to time, to let to farm the rates, tolls, and sums hereby made payable or any part thereof, upon the whole or any part of the

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simple of the railway land being vested in them (a) they have at common law a power to demise it. There have in point of fact been such demises: e. g. Bristol and Exeter Railway to the Great Western Railway, the Aylesbury Railway to the London and Birmingham Railway, and there are many other cases.

Then it will be contended that there is something in the peculiar provisions of the act under which this railway was made, which exempts it from the application of the general principle of assessment to the poor rates.

The 157th section is relied on; that section is, "And be it further enacted, that in all cases in which the said Company of proprietors shall carry for their own profit any passengers, cattle or other animals, goods, wares or merchandize, articles, monies or things, a separate account shall be duly kept, shewing the amount of rates or tolls which would have been received by the said Company for the use of the said railway, in respect of such passengers, cattle or other animals, goods, wares or merchandize, articles, monies or things, if carried by any other party or parties,

said railway, to any corporation or person, for any term which they shall think proper, not exceeding seven years from the commencement of any such lease, and to commence in possession upon or within three calendar months next after granting the same, and every such lease shall be valid and effectual, and the respective lessees thereof, and also such persons as such lessees shall appoint to collect and receive the rates, tolls, or sums so let, shall, during the continuance of any such lease, be deemed collectors of the rates, tolls or sums so let, but for the proper use of the lessees thereof, and shall have the same power and authority for collecting and recovering the same, as if they had

been appointed for that purpose by the said Company, provided that public notice of the intention to let the said rates, tolls and sums, or the part thereof intended to be let, shall be given by the said company by advertisement to be inserted in one or more of the London daily newspapers, and in some newspaper or newspapers usually circulated within the town of Southampton, and within the counties of Southampton and Surrey respectively, at least thirty days prior to any meeting of the said Company or the said directors, at which it may be intended or proposed that the said rates, tolls and sums, or any part thereof, shall be let as aforesaid."

(a) See ss. 27 to 50 inclusive.

and the overseers of the poor of the several parishes and townships through which the said railway shall pass shall have free access to and liberty to inspect the same at any time during the first fourteen days in the months of July and January in such year."

This is a clause in an act of parliament introduced by and passed at the instance of a private body, and must not be taken to alter the general law, unless it does so in plain and undoubted terms. The parochial assessment act too (6 & 7 Will. 4, c. 90, s. 1)(a) is subsequent to the act for forming this railway (5 Will. 4), and that expressly enacts that the rate shall be estimated on hereditaments "at the rent at which the same might reasonably be expected to let from year to year," with certain specific deductions.

If the rate is to be laid on the amount of tolls only, the Company may reduce the amount to any sum they please, and as long as they are themselves carriers, without diminishing their profits. The act of parliament fixes the maximum of the tolls to be levied, and nothing more.

M. D. Hill, Kelly and Gunning contra. The general principles of rating contended for on the other side are not only not disputed, but insisted upon; the question is on the application of them. The Railway Company have a

(a) "That from and after such period, not being earlier than the twenty-first day of March next, after the passing of this act, as the Poor Law Commissioners shall by any order under their seal of office direct, no rate for the relief of the poor in England or Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to

year, free of all usual tenant's rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent; provided always, that nothing therein contained shall be construed to alter or affect the principles or different relative liabilities, if any, according to which different kinds of hereditaments are now by law rateable."

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double capacity, first, as proprietors of the railway, and secondly, as carriers upon it. In respect of their profits in their former capacity they are rateable; in respect of their profits in their latter capacity they are not. The question then is, how their profits are to be divided, how much attributed to each source.

The Railway Company is a corporation created by the legislature, and invested with particular powers. They have powers necessary to enable them to complete what may be termed a statutory highway; for that purpose they can compel the owners of land to sell it to them, but, when they have purchased it, they do not hold simpliciter, as the former proprietors did, but they hold it subject to certain rights of the public, which the legislature secured to them, viz. the right at fixed payments to run engines and carriages on the railway. The railway statutes fix the maximum of these tolls, and, if the Railway Company were not themselves carriers, it is clear that these tolls alone must be taken as the basis of the calculation of rateability. But it is said that they are also carriers, and, as such, occupiers of the line, and that an inquiry must therefore be made into the amount of the sum which might be obtained from other parties to be such carriers, with such advantages as the Company have. Those advantages, if accidental, or in any way forming part of the profit of a trade, cannot be the subject of a rate, however valuable they may be. In point of fact, the Company are now no doubt the sole users of a statutory highway, and as such they make a large profit: that state of things however is mere accident, which may terminate at any moment. It is said that practically the owners of a railway have a monopoly, and that therefore what would be given by a lessee to be in that position is rent. How however can it be said that the Company have even in fact such a privilege or monopoly as to amount to a property? A line must be drawn, however difficult it may sometimes be to trace, distinguishing mere trading advantages from those attached permanently to a

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tenement, such as would be superiority of situation of a shop for a retail trade, and other like cases. Suppose what is here called a monopoly arose merely from the circumstances that the magnitude of the capital required made it most improbable that any person should be able to enter into competition with them; can it be doubted that that could not make them subject to rateability for the use of the way? Then what is the difference between that case and this? Here the monopoly, if any, proceeds from the advantage the Company have in their stations for their passenger traffic, and for supplying water and coke to their engines. But such advantages are not annexed to the railway, and form but a very minor ingredient in the cause of the production of profit. The value of the possession of such advantages by the Company is not to be added to the tenement. There is nothing to prevent the public building on the adjoining lands, and, indeed, express power is given to the owners of such lands to make communicating lines to their railway; 1 Vict. s. 48. It is not disputed that the station-houses are rateable according to their value, and in fact, though it does not appear in the case, they were rated apart from the railway. Suppose there were a practical monopoly, arising from the Company being proprietors of a patent for a steam engine of particular construction, with which, from its cheapness or speed, the ordinary engines could not compete. It must be obvious that that advantage would be profit of superior skill in trade, and yet such a monopoly might in effect be transferred by a letting of the railway, with a licence to use the Company's engines.

The Company, electing to be themselves carriers, have no doubt certain advantages; those advantages are not inseparable or necessarily arising from the tenement, and are therefore not the subject of rent, they are mere accidents, which give the Company a facility of carrying on the trade of carriers at a greater profit than any other person could do. Suppose the railway with its fixtures and appur-

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tenances were demised, the Company would not cease to be a corporation, nor to have a right to use their own engines and carriages for carrying on the line. They might part with their right by covenanting not to do so, but any sum which they would receive for such a covenant could not in any sense be said to be rent. It would be the same thing if any other person, who, as one of the public, had a right to use the railway, and who had threatened opposition, should be induced, for a valuable consideration, to enter into such a covenant with a lessee of the line.

The case does not find the rent which might be obtained for the railway with its fixtures under existing circumstances, but hypothetically finds it, if the Court say a third party could, on a demise of the railway to them, be capable of making the same profits as the Company now do. How can the Court say that a lessee would be capable of doing so, when it is obvious that in case of a demise it might be not only the interest of the Company to be carriers themselves, but to assist other persons in carrying, in order to give tolls to the Company? The case of *Rex v. The Duke of Bridgewater's Trustees* (a) is an unimpeachable authority, and is exactly in point. There a canal had been formed, the proprietors of which united in themselves two different characters, they were proprietors of the canal, and they were also carriers on it. As proprietors they were entitled to receive the tolls and profits in respect of traffic on the canal, and that was held to be a fit subject for rating, but in their character as carriers they received other profits, and those were held not to be fit subjects of rating,—the distinction being drawn between the profits of the canal, and the profits of the proprietors as carriers. Applying that case to the present, the circumstances would be found to be as nearly identical as possible. A canal was valuable to its proprietors by reason of the tolls which they were entitled to receive for the passing of vessels upon it. A railway

(a) 9 B. & C. 68; S. C. 4 M. & R. 169.

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was valuable to the proprietors qua proprietors only by reason of the tolls which they were entitled to demand for the use of it by carriers. So far then the cases were the same. Again it might happen that the same persons who were the proprietors of a canal, and were in that capacity entitled to demand tolls, were carriers, and instead of receiving tolls from others, might carry on a traffic on the canal, and might so be liable to pay tolls as well as derive a profit entirely separate from the profits arising from the land. So a Railway Company might be carriers on their railway—they might have their engines and carriages as the Canal Company had its boats and barges, but they would do so in their capacity of carriers, and for the profits derivable from such trade they would not be rateable. So it was held in the case referred to, and so the Court would be disposed to hold in the present case, and the distinction was so clearly laid down in the judgment of Mr. Justice *Bayley*, that the Court would have no hesitation in saying that the liability of the defendants in this case was confined to the amount of the tolls received by them as proprietors of the Railway Company. The profits of carrying goods and passengers in nowise belonged to the occupation of the railway, but to the use of the engines and carriages,—they were the profits of carrying on a trade as carriers, and as such were not rateable, but the tonnage in the case of a canal, and the tolls in the case of a railway, were the real profits of the land, and constituted the proceeds of the occupation of the freehold, which were liable to be rated. The only difference which could possibly be supposed to exist, was, that in the case of a Canal Company, the canal being more easy of use by strangers, the tonnage was actually paid by the persons who used the canal who were in some cases strangers, while in the case of a railway there were few instances of the tolls being actually paid, because few strangers made use of the railway as carriers.

In the cases cited of *Rex v. Liverpool Exchange*, *Rex v. Guest*, *Rex v. Cambridge Gas Company (a)*, in estimating

(a) *Ante*, p. 8.

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the rate, advantages attached to the freehold were taken into account, because these advantages were necessarily attached to the land by the acts of parliament respectively applying to them.

The clause has been referred to, which calls upon the Company, in the event of their being carriers themselves, to keep an account of the tolls which they would have been entitled to receive for the same amount of traffic from other persons. It is not contended that this clause is a substantive enactment, releasing the defendants from a liability to the general law of rating, but it shews what in the contemplation of the legislature was the mode of imposing the rate on this description of property, and provides facilities for ascertaining the amount.

It has been urged that, if the rate is to be laid on the amount of tolls only, the Company may lower them, so as to reduce the rate to a very small amount. That, however, is not to be intended; and, if the Company attempted to do so in fraud, a rate would be supportable upon the amount of tolls which they might reasonably be expected to demand from carriers who should carry on the line instead of themselves.

There is nothing in any part of the act from which, on the other hand, any inference can be drawn opposed to the argument of the defendants. The statutes contain two sets of clauses, one relating to the creation and management of the railway, the other has relation to the Company as a corporation, but the latter clauses contain nothing more than is necessary to enable the Company in their corporate capacity to become carriers. To say that as such they have a legal monopoly, is to say that the legislature has committed the grossest absurdity; that in the face of an express declaration that the railway shall be free, that the public shall have a valuable property or privilege in it, they have given authority to the Company so large, that the expressed intention of the legislature must be necessarily defeated. Even however if that were so, if the Company

have a monopoly of carrying, the profits of such a monopoly would not be rateable. Such profits must be looked upon apart from the profits of the land. If a man possessed by law a monopoly of the sale of a peculiar article, the test of rateability of the place in which he carried on his trade would not be the amount of profit which *he* makes in it, but what it would let for to a person who had no such privilege. So here the question of the rateable amount, even if the Company have the monopoly alleged, is not the value to those possessed of the monopoly, but the value it would be of to them if they had it not.

The lighthouse cases are in point. It has been uniformly decided that lighthouses are not rateable in respect of the sum which they may be said to earn, from tolls payable on ships passing within a certain distance (a); such tolls, as *Bayley J.* said in *Rex v. Fowke* (b), not arising "from the building, nor from anything of necessity connected with it."

In endeavouring to determine the true measure of the rate, the object should be to obtain one that will be equal and unvaried by accidental circumstances, such as the occasional greater or less profit of the occupier; *Rex v. Adams* (c). "A rate," said *Parke J.* in delivering the judgment of the Court in that case, "ought not to be made according to the profit derived by the occupier himself; for, if that were so, the rate must vary according to the nature of the occupier's interest." If rent is taken as the measure of rateable value, here it will lead to the greatest inequality. There are many cases of a continuous line of railway belonging to different companies, who run their carriages, on payment of toll, on the railways of each other. Suppose then the case of the trains of the Brighton Company, who have their own engines and carriages running on the Croydon line to the London terminus. The Brighton Company in respect of

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(a) *Rex v. Coke*, 5 B. & C. 797; S. C. 8 D. & R. 666,

(b) 5 B. & C. 816; S. C. 9 D. & R. 120.

(c) 4 B. & Ad. 86.

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that traffic would be rateable upon a supposed rent, but the Croydon Company, which receives the tolls from them, would be rateable on those tolls only.

Cur. adv. vult.

Lord DENMAN C.J. now delivered the judgment of the Court.—This case has stood over for consideration for some time, on account of its novelty and its supposed application to the rating of Railway Companies in general to the relief of the poor. It must, however, be determined on its own state of facts. The question raised is, whether this Company, being in occupation of its own railway, and at present in the exclusive use of it in fact, for the purpose of a large carrying trade, the rateable value of such occupation is to be taken only upon the amount of certain tolls which have been fixed, under the statutes hereinafter mentioned, as payable generally by all carriers for the use of the railway, but which are in fact never paid, or upon the amount of the general profits which the Company in fact receives from the occupation so devoted to such carrying trade. Another question was indeed raised as to the mode of measuring the rate, on whichever of the two principles it was to be calculated, namely, whether it was to be measured according to the proportion which the mileage of the railway in the respondent parish bears to the whole length of the way, assuming the profits to arise equally through the whole, or according to the actual earnings in this parish. This question however was not much argued, it being conceded ultimately that the latter was the proper mode, and the result was agreed to be that the rate ought to be for 3800*l.* if the parish be right, and 1293*l.* if the Company can limit their responsibility to a rate in effect on the tolls only.

The railway has been formed and is regulated under the authority of several statutes. By the first, the 4 & 5 *Will.* 4, the proprietors were incorporated and authorised to purchase lands in fee simple, subject to certain qualifi-

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cations not material now to be noticed. On the lands so purchased, they are to make and maintain a railway *with warehouses, stations and landing places* for the purpose of locomotive engines, carriages and waggons, &c., and for loading, unloading, landing, &c. of goods, and the approach and departure of passengers for conveyance. For the tonnage of goods, and in respect of passengers, beasts, cattle and animals, conveyed in carriages on the railway, and also for carriages conveyed on it, they may demand certain tolls, of which the maximum is fixed and not the minimum; and, further, they may themselves provide power for the propelling of persons and things, or they may themselves convey such persons or things on their railway; for which, in addition to the before mentioned tolls, they may charge such sums as they may from time to time fix. The Company may therefore be simply the owners of the way, on which others may place steam power and carriages, and convey persons and goods, and these two parties would then stand much in the same relation to each other as the trustees of a turnpike road and the coach and post masters conveying passengers on it. In this case they would receive the tolls only,—the owners of the steam power and carriages, the fares or remuneration for conveyance; and it would be of course the interest of the Company to raise the tolls to the maximum, or as near to it as the competition of the ordinary modes of travelling would allow. On the other hand, the Company may avail themselves of the latter clauses, and unite both characters, of owners of the way and carriers on it; they will then receive both the tolls and the fares. In both cases the persons or owners of goods conveyed must pay both the tolls and the fares; but, in the latter, as the Company would be the first and last receivers of both, they might be charged as well as paid in one undistinguished sum; there would be no division; and, supposing the Company to be the only carriers, there would be no necessity

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for fixing any rate of toll at all; the whole payment might just as well be considered fare.

This appears in fact to be the existing state of things: but the statute, sect. 157, has provided that, where the proprietors shall carry for their own profit, a separate account shall still be kept, shewing the amount of tolls which would have been received by them merely for the use of the railway, if such conveyance had been by other parties, to which account the overseers of the parishes shall have access during the first fourteen days in July and January in every year. But this act makes no provision for such an account being kept and open to the same inspection, where other parties do in fact convey on the railway, when it would be equally necessary;—an indication, it may be thought, that the framers of the act did not seriously contemplate, what in truth has not happened and probably never will happen, that any parties but the Company would ever become carriers on the railway. By the second act, however, which passed in 1897, this 157th section is referred to as if it directed that a separate account should be kept in *both* cases and be open to inspection, and the neglect to keep it, or refusal to permit its inspection, is subject to the very heavy penalty of 300*l.*, and 50*l.* per diem for its continuance. The effect of these clauses on the argument we must consider in the sequel. By the 172d section of the first act, all persons have free liberty to use the railway with carriages properly constructed, on payment only of the rates, tolls, and sums demanded by the Company, and subject to the rules and regulations which they shall from time to time make. The construction of such carriages must also be agreeable to the orders of the Company, and approved by their engineer or agent. But, although the railway itself is thus, under certain qualifications, thrown open to the public as a highway, no corresponding provision appears to have been made with regard to the warehouses, wharfs, stations, or landing places. Both of the statutes

before-mentioned contain powers for the purchase of forty additional acres (eighty in the whole), for the erection of additional stations, yards, wharfs, warehouses, and other similar erections, and conveniences for receiving, depositing, loading and unloading goods, and other purposes connected with the undertaking; but, as to these lands, neither statute gives the public any right of access or user adverse to the Company; and the use, for any thing that appears, might be denied to any individual desiring to become a carrier on the railway.

These are the material facts and provisions which the case states, and the statutes supply, and to these we are now to apply the rule of rating prescribed by the 6 & 7 Will. 4, c. 96, s. 1. The 3 & 4 Vict. c. 89, was referred to in the argument, but it has in truth little or no bearing on this question. It prohibits the rating of *any inhabitant, as such inhabitant, in respect of his ability* derived from the profits of stock in trade, or any other property, to the relief of the poor, but it expressly leaves unaffected the liability of any occupier of lands or houses to be taxed under the provisions of the 43 Elix., and the 13 & 14 Ch. 2. Under the 6 & 7 Will. 4, c. 96, the rate must be made on an estimate of the "net annual value," and that value is declared to be "the rent at which the hereditaments might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and the commutation rent charge, if any, necessary to maintain them in a state to command such rent." To this enactment is added a proviso, that "nothing in it shall be construed to alter or affect the principles according to which different kinds of hereditaments were, at the time of its passing, by law rateable."

The argument for the Company may be stated shortly; it is clear, and if it be applicable to the circumstances, convincing. It is said that, in order to apply the statute, it is always necessary to suppose the property in respect of which the rate is imposed let from year to year. The portion of the railway in the respondent parish must therefore

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be supposed to be so let; and, in order to estimate the rent, it must be asked, what the tenant would take by the demise? The answer to which would be, the portion of the railway itself, and the perception of the toll, as before fixed by the Company. He would have the right to place his own carriages on the railway, not in virtue of the demise, but in common with all the world. The gross rent, therefore, would be something less than the amount of the toll, by the allowance for tenants' profits; and, after making therefrom the statutable deductions, the residue will be the net annual value on which the rate is to be imposed. If, because the lessee in occupation should place carriages on the railway, and derive therefrom a profit, you were to rate him in respect of that profit, you might equally rate any other carrier using the railway, but having no interest in it; for the user in the case of a lessee is not referable to his occupation under his demise. This, therefore, would be in violation of the statute.

We forbear to notice at present the subsidiary parts of the argument. It is obvious that the case here supposed, which is that of a lessee in exclusive perception of the tolls on a railway *practically open to rival carriers*, is one very different in fact from the case before us; one, moreover, which not only has not occurred, but from the nature of things, it may be safely said, never can occur. The supposition of a lease of a portion of the railway, with no demise of the stations, warehouses, and approaches to it, or at all events some provision for the use of them, is merely absurd. Such a lessee would be a mere toll collector for the Company, without even, as it should seem, any convenient mode of collecting the toll. The supposition, again, of a free competition of carriers on the same railway is practically little else than absurd. If all difficulties were removed as to the stations, warehouses, landing places and approaches, and all these were supposed as much laid open to the public as the railway itself, the very nature of the mode of conveyance forbids a free competition of rival

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carriers. But how can we suppose any competition possible with the Company now the carriers, or indeed any free use of the railway, even by a private carriage, the Company retaining the independent occupation and control over all the existing approaches? Nay, a lease which should include the stations and warehouses, and approaches, and place the lessee, as to extent of occupation, in the same position exactly in which the Company now are, would not be without its difficulties, for the Company's act is framed, whether quite effectually or not, with some regard to the interest of the public as well as of the Company. The travelling and conveyance by carriages drawn or propelled by locomotive engines are attended with peculiar and very alarming risks. Many regulations of police, therefore, are enacted which the Company are charged to enforce; and it is very questionable whether their lessee could be their delegate as to this trust, while it is certain that the Company out of possession could not discharge the duty so conveniently or perfectly as they now can.

These are considerations which make us pause in giving our assent to the arguments which suggest themselves. The proviso in the 6 & 7 Will. 4, declares that the principles of rating are not to be altered or affected by it. It is therefore important to consider how, under the circumstances stated in the case, the Company would have been rated if that act had not passed. They would then have been found occupying buildings and lands on an entire line of railway, and carrying on a trade not merely therein and thereon, but, thereby, a trade inseparably connected with such buildings and such lands: a trade that could have no existence without the buildings and lands, and but for which the buildings would not have been erected or occupied, and for the sake of which, in a great measure, the lands themselves are occupied in a particular manner. The profits of this trade would be included in the fares received for the conveyance of goods and passengers, and the question would be, whether these profits ought in any or

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what degree to affect the rateable value of the lands and buildings.

There is a class of cases often cited, which has established the principle on which this question is to be answered. We allude, among others, to *Rex v. St. Nicholas, Gloucester*, in *Cald.* 269, and *Rex v. Bradford*, 4 *Maule & Selwyn*, 317. In the first, a steelyard, part of a machine in a street leading by a house, was in the house; sums were paid by persons for weighing their waggons and carts, but these persons were not compellable to weigh them. Without these profits the house was worth 5*l.* per year. These profits were worth about 40*l.*, and these, after due deductions, were included in the rate, as enhancing the rateable value of the house. The Court thought rightly so. Lord *Mansfield* considered the house and machine as one entire thing. "The principal purpose of the house, said he, is for weighing. The steelyard is the most valuable part of the house." "If, said *Willes J.*, a billiard table stands in a house and the house should in respect of such table let at a higher sum, it is rateable, *while the table continues there, and it is so let*, at the advanced rent." *Buller J.* said, "There is an extraordinary profit arising from the modification of the enjoyment. The only question therefore is, whether a man shall be rated for the property he has. If a house to-day is let for 30*l.* per annum, and to-morrow, if turned into a shop, would let for 50*l.*, when it is turned into a shop it shall be rated at 50*l.*" The Court clearly regarded neither the nature of the source of profit, nor its permanence. They looked only to the existing value of the subject-matter of the rate—the house, and rated it according to that value.

This principle had become so well established by the time *Rex v. Bradford* came before the Court, that it was then sought not to deny but to evade it, by demising the canteen, and the privilege of using it as such, and selling liquors therein, at two distinct rents, in the hope of successfully contending that the rate should be on the rent

of the house only. The Court, however, looked to the substance, not to the form, and held both sums to be parts of one entire rent, paid for the occupation of the house and the enjoyment of the advantages, which for the time belonged to it, and for the time enhanced its value. As, in the former case, people might cease to weigh at the engine or the engine might be removed; so, in this, the barrack might cease to be occupied; the customers being all removed, the licence to sell liquors might be withheld or forfeited; still while these remained, and so the additional value was sustained, that value, it was held, must come into the rate. And, as *Le Blanc J.* expressly said, this was not rating the canteen man "in respect of the profits of his trade, but only of the rent which he paid." The occupation of the house was indeed necessary for the earning the profits of the trade, but the house became more valuable because it enabled the profits to be earned. How it became valuable the overseers were not to inquire. Finding it so, they were to rate the occupier according to that value.

We are now to consider a case on which much reliance was placed by the appellants: it has always been considered a leading one, and we think will not, on examination, be found to conflict with the preceding; we mean *Rex v. The Trustees of The Duke of Bridgwater* (a). The question there was simply this, whether, when the other occupiers of lands in the parish were rated on four-fifths, not of the actual value, but of their rents taken as the value, the appellants ought, being the owners as well as the occupiers of land covered by water and used as a canal, and from which the case found they derived no profits, except from the tonnage of goods carried on it, to be rated at four-fifths of the *gross receipts* of such tonnage. The Court determined, as might have been expected, that equal allowances must be made in both cases. The rent, or the sum at which the land will let, is the proper criterion; but the rent they said is not supposed here to be the value of the

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land or of its produce, *minus* the expense of producing, but the value, after deducting the expenses of cultivation and the farmer's subsistence. On *this supposition* it is clear the rate was unequal. *This was all that was decided.* The trustees were also rated as the occupiers of warehouses, &c. adjacent to the canal, but, as to these, by arrangement, no question was to come before the Court, and they were also carriers on their own canal, and received freight as such for goods carried, on which the tonnage was included in the rate on the canal. The question being thus confined to the canal, and the trustees, as carriers, merely using it as any other person might and did, their characters of *occupiers of land* and *carriers* were quite distinct. The tonnage strictly respected their profits in the one, the freight their profits in the other. These last were unconnected with the land, did not add to its value, and therefore were properly excluded from the rate.

Let now the principle which these cases establish be applied to the facts before us, if we wish to know whether the fares would have been properly included in the rate before the Assessment Act passed. We apprehend that, according to that principle, the only question to be asked would be, do they increase actually the value of the buildings and lands on which the rate is to be made? If they do, and to whatever extent they do, to that extent, due allowances always being supposed, they must directly or indirectly be included. It would be no answer to say, that by law the railway is a highway; that all the world may carry goods and passengers on it; that it is an accident that the Company alone monopolize all the trade, and that their monopoly may cease to-morrow. These circumstances, so far as they lessened the value of the buildings and lands, would be proper to be taken into the account as to the quantum of the rate, but they would not affect the principle. Then *do* the fares increase the value of the buildings and lands? No one can doubt, indeed the case has answered that they do, that a higher rent for the buildings and lands might be obtained in consequence of the facility afforded by the occu-

pation of them to the carrying on of a lucrative trade, and earning the profits on those fares. The case thus supposed would be exactly the same in principle as that of the house and engine, the house and billiard table, the house converted into a shop, the canteen; and it would be distinguished from the canal case, because there by agreement the warehouses, &c. were laid out of consideration. The trustees were, in fact, only carriers in common with all the world, and to the extent by which their trade on the canal did augment the value of the canal, it was brought into account.

But it will be observed that so far we have supposed lands and buildings, the railway, and the stations, &c. all in one parish, and included in one rate. Will it make any difference in the *principle* that the railway is in more parishes than one, and that we are now dealing with a parish in which, so far as appears, there is no station-house or other appendage to the railway? We think not. The subject-matter of the rate in any particular parish is, no doubt, the beneficial occupation of the land there, and you cannot draw into the rate the value of the occupation of buildings elsewhere; yet, as you are to rate on the value in the parish, *however occasioned*, you cannot strike off any portion, because it would not have existed, but for the occupation of buildings in another parish; still it exists, and in the parish, and therefore cannot escape the rate there. Suppose *A. B.*, occupying an entire tenement, as an inn in two parishes, *C.* and *D.*, the lodging part of the building in *C.*, and the tap and stables in *D.*, there would be two rates; but could the owner say in *C.*, "True it is that which I occupy here is, *de facto*, more valuable than a mere dwelling or boarding house, but that is in a great measure because it is connected with the tap and stables in *D.*, you must reject whatever is referable to that connection, and rate me here as if I occupied an inn, without tap or stables; you must suppose a demise only of the parts in *C.*, and rate upon a rent to be given only for what that demise would pass to me." The answer would be, if the occupation of

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this part is, in fact, of a certain increased value, whether that increase be derived in part or in the whole from the other, is immaterial. Wherever the valuable occupation is, there the occupier must be rated in respect of it. Then in the present case it would become a question of fact.—Is the land occupied in the respondent parish by the railway more valuable in fact to the occupier by reason of his occupation, together with the stations &c. elsewhere, and the general purposes to which altogether are applied? We suppose that without doubt this would be answered in the affirmative. Sever it from them, and three or four miles of railway, unapproachable, leading from and to no place, having no connection with any termini, would be absolutely useless and unproductive. Give them the connection which in fact exists, you give them a value increased indirectly from the stations, warehouses, and portions of the entire line in other parishes, and directly by the general traffic, to the profits derived from which every where they are indispensable contributors, and through one part of which they directly came.

We are thus led to the conclusion, that, if this case had been to be considered before the passing of the Parochial Assessment Act, the principle of rating on which the respondents have proceeded would have been found the true one. Has then the statute made any difference in this respect? Now, without having recourse to the express language of the proviso, it is clear that the enacting part introduced no new principle of rating. From the time of the decision in the case of *Rex v. The Trustees of the Duke of Bridgewater*, before referred to, it had been understood generally that, fraud apart, the rent, whether the occupier was the owner or only the tenant, in the former case a supposed, in the latter a real rent, was to be the criterion of rateable value. Both parties in the present case appeal equally to this criterion. The difference between them is, (there being no real demise,) what is to be brought into the supposed demise, and, as to this, it is obvious that

the statute can make no difference, the only question between the parties being as to the proper mode of applying the admitted principle. In cases upon rating, in which the great objects are to procure equality and to bring every thing into contribution which ought to share the public burthen, it is essential (as Lord *Ellenborough* said in *Rex v. Bradford*) to regard the substance and not the form; "we must, said he, judge of things as they really are, and not as they appear to be, and therefore we are to consider here whether this be not substantially one entire rent in respect of one entire subject, though artificially divided into several payments." If we deal with this case in the same sensible and just way, we shall be at no loss to see, that to break up this entire line into parochial portions, and then in imagination sever all and each from the buildings which the occupiers occupy together with it de facto exclusively and under the authority of the same statutes passed in furtherance of one great scheme, and then again in imagination to sever both from the traffic, which the occupiers carry on in, by, and throughout the whole de facto exclusively, and for the sake of which they have made, built, and occupy the whole, is to apply the principle of the statute in form and not in substance, and so as to lead to a mere evasion of its object.

If it be said that not only by law but in fact, the Company may lease their line and become mere carriers on it, or that they may demise their buildings and carriages, cease to be traders and become mere occupiers of the railway, the answer is, that the present rate, with which alone we have to deal, is not made on either of these states of facts, that, whenever either shall arise, the rate must be altered to meet it, but that even then, in all probability, the result to the parishes would be much the same, the rate only would become apportionable between two classes of occupiers, instead of being charged on one.

But it is said that the private statutes conclude this question by the clauses referred to in an early part of

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this judgment, directing, under a severe penalty, a certain account of tolls to be kept for the benefit of the overseers of the poor. It is asked what object can be conceived for that provision as to the tolls *alone*, unless the tolls alone be the fund with which the overseers have to do? Some answer was attempted to be given to this question in the argument, but not we think very successfully. The truth is that the counsel for the appellants very much overrated its importance in the argument. The framers of this statute, which must not be dealt with, when we are talking of intention, exactly as if it were a public general act, but rather as the mode of carrying into effect a bargain between certain individuals and the public, no doubt intended to limit the rate, if by law they could, to the tolls alone, and these clauses were inserted to effectuate the working of that mode of calculating the assessment, if it should prevail.

We have already noticed an omission, remarkable enough, in the first act, and the awkward mode by which it is attempted to be supplied in the second. But we are not now construing these clauses—only considering the collateral bearing on the argument which their insertion in the act has. All that need be said therefore is, that that bearing is not strong enough to prevent the application of the general principles of law to the rating of the Company's property in their occupation. We conclude therefore in favour of the respondents' principle. The sums are agreed between the parties, and we decide in favour of the larger, by the application of admitted principles to the facts, thinking that that represents truly the actual rateable value of the land occupied by the Company in the respondent parish. The rate will therefore be confirmed (*a*).

Order of Sessions confirmed.

(*a*) Or rather amended, as, according to this decision, the rateable value of the railway in the parish is 3800*l*. The rate was a

sixpenny rate, which, on 3800*l*., would be 95*l*., and not 108*l*., the amount inserted in the rate.

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The QUEEN v. The Inhabitants of OUNDLE (a).

ON appeal to the Northamptonshire Quarter Sessions, in April, 1841, against an order of removal from the parish of Titchmarsh, in the county of Northampton, to the parish of Oundle, in the same county, the sessions dismissed the appeal, subject to the opinion of this Court upon the following case:—

The inhabitants of the parish of Oundle caused their appeal against the said order to be entered at the general quarter sessions of the peace of the said county on the 7th January, 1841, at which sessions the court made an order, which, after reciting the order of removal and the entry of the appeal at the said January sessions, proceeded thus:—
“Now, upon the opening of the said appeal by *A. B.* of counsel for the respondents, and hearing *C. D.* of counsel for the appellants in reply, and it appearing that notice of the grounds of the said appeal had not been given by the appellants to the respondents, as required by the act of parliament in that case made and provided, this court doth refuse to hear or respite the said appeal, and doth hereby order that the said order of the said justices be ratified and confirmed, subject, nevertheless, to the opinion of the Court of Queen’s Bench on a special case,” &c.

Subsequently, at the same January sessions, the court made another order, which, after reciting the same order of removal, proceeded thus:—“And whereas the inhabitants of the said parish of Oundle did, at this sessions, by *C. D.* their counsel, pray this court that they might be permitted and allowed to enter their appeal against the above recited

A special case from sessions stated that an appeal against an order of removal had been dismissed, and the order confirmed on the ground that no grounds of appeal had been given, the sessions refusing to hear or respite the appeal: that subsequently, at the same sessions, the sessions made another order, on the usual motion, permitting an appeal to be entered against the same order. (The case did not state whether the sessions knew the second entry applied to the same order as to which the appeal had been previously dismissed.) That the appeal so re-entered came on for hearing at the next sessions, when it

(a) Decided in Easter term, 1842 (April 27th).

appearing that the order appealed against was the same order, the sessions considered that the said order of removal had been absolutely confirmed by the judgment of the previous sessions, and dismissed the appeal. The question for this Court was, whether the sessions “were right in considering the order of removal as absolutely confirmed, and in dismissing the appeal:”—*Held*, that they had a right to dismiss the appeal.

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order to the judgment of this court, to be tried at the next general quarter sessions of the peace, to be holden, &c. Now this court doth order that the inhabitants of the said parish be permitted and allowed to enter their appeal against the above recited order to the judgment of this court, to be tried at the next general quarter sessions, &c., upon due notice thereof to be in the mean time given to the churchwardens, &c. of the parish of Titchmarsh."

This appeal accordingly came on to be tried at the last April Quarter Sessions for the county of Northampton. It did not appear at this time that any case had been tendered by the appellants to the respondents in pursuance of the said first mentioned order of the 7th day of January, at any time since the previous sessions.

On the trial of this appeal, the only evidence given by the respondents was the entry in the clerk of the peace's book of the order of sessions, made on the 7th day of January, 1841, first before mentioned. The order of the previous sessions, secondly before mentioned, was also read, and it appeared to the court therefrom (as the fact was) that the order of justices now appealed against was the same as that referred to in the first order of the previous sessions. The court considered that the said order of justices had been absolutely confirmed by the judgment of the previous sessions, and that such judgment was still in full force, effect and virtue, and in nowise revoked or altered by the said second order of the said previous sessions, and therefore refused to hear any evidence on the part of the said appellants, although required so to do, and dismissed the appeal with costs.

The question for the opinion of the Court of Queen's Bench is, whether the sessions were right in considering the order of justices as absolutely confirmed, and in dismissing the appeal.

If the Court of Queen's Bench should be of opinion that the said Court of Quarter Sessions was right, under the circumstances hereinbefore mentioned, then the said order,

dismissing the said appeal, is to be confirmed: if otherwise, the said order, and the said order of the said two justices, to be quashed.

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Sir *F. Pollock A.G., Miller and Wing*, in support of the order of sessions. There cannot be two appeals against the same order of removal; and the sessions, therefore, were not bound to hear the second appeal. The entry of the same appeal a second time was a mere *ex parte* and formal proceeding, which cannot be taken to have had the sanction of the sessions. The sessions could not make an entry of different judgments as to the same matter: *St. Andrew's, Holborn, v. St. Clement's Danes* (a). The order of removal stood confirmed by the order of the January sessions, and their order of confirmation could not be revoked except by express words. The appellants should have got the first order of sessions discharged before re-entering the appeal. In *Rex v. The Justices of the West Riding* (b), where the sessions dismissed an appeal against a conviction, and confirmed the conviction without entering into the merits, because the preliminary conditions on which the appeal was granted by statute had not been regularly complied with, the judgment was held conclusive, and a second appeal was not allowed to be entered.

Kelly, Flood and Barlow, *contra*. The sessions have no power to confirm an order appealed against unless the appeal has been heard; and, even if they had this power, their confirmation of an order, subject to a case, was no confirmation: *Rex v. The Justices of Pembrokeshire* (c), *Rex v. The Justices of Suffolk* (d). The last-mentioned case shews also that the sessions, in allowing the appeal to be re-entered, did no more than this Court would have compelled them to do under the circumstances, the first

(a) 2 Salk. 494.

(b) 3 T. R. 776.

(c) 2 B. & Ad. 391.

(d) 1 Dowl. P. C. 163. See also
Rex v. Justices of Suffolk, 1 N. &
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order having been made subject to a case, and the case not having been brought up.

The sessions must be taken to ask this Court whether they had not power to make the second order, nullifying the first. [Lord DENMAN C. J. I should infer from the statement of the case that the sessions knew nothing of the second appeal being against the same order which they had already disposed of. The usual practice is to put a motion paper into the hands of the clerk of the peace, and then he enters the appeal as of course, without the court knowing anything of the matter.] If the second appeal had not been regularly entered, they might have vacated the order for entering it: it must be taken therefore to have been regularly entered. The sessions were bound to have adjourned the first appeal; for the 4 & 5 Will. 4, c. 76, merely requires that the grounds of appeal should be furnished fourteen days before the appeal is intended to be heard, and gives no power to dismiss the appeal if they have not been duly furnished. *Rex v. Kimbolton (a)* shews they might have adjourned; and the question now is, whether they had not a right, by re-entering the appeal, to rectify their mistake in not adjourning it at the January sessions.

LORD DENMAN C. J.—It appears that, when this appeal came on at the January sessions, notice of the grounds of appeal had not been given as required by the statute, and that the sessions therefore refused to hear or respite the appeal, and confirmed the order of removal, subject to a privilege, which the appellants did not choose to exercise, of stating a case for the opinion of this Court. Subsequently at the same sessions an order was made, permitting the same appeal to be entered a second time. In point of form it was by the order of the sessions that the second entry of the appeal was made, but we cannot but see that it was substantially an *ex parte* proceeding by the appellants, of which their opponents would have no notice or knowledge

(a) 1 N. & P. 606.

whatever; the usual practice being, that the motion to enter and respite an appeal is a mere motion of course, on which the appeal is put into a particular paper, without any communication to the respondents. In this case, the appeal having been once dismissed, the appellants should not have moved, in a mere formal way, to enter it as of course, and as though it had been an entirely distinct appeal from the previous one. However in this formal way the appeal is re-entered, and, at the ensuing sessions, when the justices find out that it is the same appeal they had previously dismissed, subject to a case, which had not been brought up, they think the appellants had no right so to enter the appeal a second time, and they dismiss it. I think they were authorised in dismissing the appeal under these circumstances. That is the only question we need decide, and the question as to the confirmation of the order by the dismissal of the previous appeal is immaterial.

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PATTERSON J.—I think the sessions were quite right in dismissing the appeal, if they thought the order for entering it a second time was not authorised by them. The first appeal was dismissed, because the statement of the grounds of appeal had not been given as required by the Poor Law Amendment Act. The sessions refused to adjourn the hearing of that appeal, and they had a right to refuse, for the 9 Geo. 1, which compels them to adjourn an appeal, when proper notice of it has not been given, does not apply when there has been no statement of the grounds of appeal delivered under the late act. The sessions heard the appeal as far as it could be heard under the circumstances, and dismissed it subject to a case. It is said that, as their decision was subject to a case, the appeal was not in truth decided. That may be so, but still it does not shew that they were obliged to hear the appeal over again, because the appellants did not think proper to bring up the case granted them for the opinion of this Court. Whether, as the appeal was dismissed, not absolutely but subject to a case,

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the order of removal was thereby confirmed, is immaterial to us, as we think, when the same appeal came before the sessions a second time, they had a right to say, that it was not by their act that the appeal had been so re-entered, and to dismiss it.

WIGHTMAN J.—The question raised as to the confirmation of the order of removal at the January sessions is unimportant; we think, when it was discovered that the same appeal which had been once disposed of was entered a second time, that it was rightly dismissed,

D.

Order of Sessions confirmed.

The QUEEN v. Inhabitants of OLD STRATFORD (a).

Grounds of appeal stated that the appellant parish was not the last place of settlement of the pauper's father, as in the examination stated, and also that he, in November, 1832, rented a house and orchard at Easington, in the parish &c., from &c., at the rent of 10*l.* a year, and upwards, for &c., "and occupied the same under

UPON an appeal against an order of two justices for the removal of a pauper named *John Taylor*, with his wife and two children, the Court of Quarter Sessions for the county of Warwick quashed the order, subject to the opinion of this Court upon a case.

The case raised three points for the judgment of the Court, but it was pronounced on the first of them only, viz. on the sufficiency of the grounds of appeal.

The appellants admitted a settlement by birth of the pauper in the appellant parish, and they set up a subsequent settlement of *John Taylor*, the father of the pauper, in the parish of Easington, in the county of Warwick, by renting a tenement, and a derivative settlement from him to the pauper. The statement of the grounds of appeal

(a) Decided in Trinity Term, June 4.

such renting or hiring from that time until Michaelmas, 1836, and paid the rent for the same, and also was assessed to and paid the poor rate for the same, during the whole of that time." Upon a finding of the sessions, subject to a case, that the grounds of appeal were sufficient, though residence was not stated:—*Held*, they were not sufficient, and the Court therefore quashed the order of sessions.

applicable to the present case was as follows; that is to say, "And that the said parish of Whatcote is not the last place of settlement of *John Taylor*, the pauper's father, as in the examination in this case stated; and also that the said *John Taylor*, the father of the said *John Taylor* the pauper, in November, 1832, rented a house and orchard at Easington, in the parish of Easington, in the county of Warwick, from *William Marshall*, servant to *Evelyn John Shirley*, Esq. of the same place, at the rent of 10*l.* a year and upwards, and occupied the same under such renting or hiring from that time until Michaelmas, 1836, and paid the rent for the same, and also was assessed to and paid the poor rate for the same, during the whole of that time."

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It was contended for the respondents, that this statement of the grounds of appeal was insufficient, inasmuch as it was not stated therein that *John Taylor*, the father, resided in the parish of Easington for forty days, during the time of his occupation of the premises mentioned therein, but the Court of Quarter Sessions were of opinion that this statement of the grounds of appeal was sufficient.

W. T. S. Daniel and *Gale* in support of the order of sessions. Since this case was heard at sessions, this Court has decided, in *Reg. v. West Riding Justices (a)*, that, where the grounds of appeal, setting up a new settlement by renting a tenement, state the occupation only of a house, it cannot be inferred therefrom that the pauper resided within the parish; but that case is distinguishable from the present; there the Court had refused to hear the appeal, and, on application to this Court for a mandamus to compel them to hear the appeal, the question was, whether residence must necessarily be inferred from the use of the word "occupation;" here the sessions have found that they have so understood it, and this question of the meaning of the language of grounds of appeal was one which they were

(a) 1 G. & D. 706.

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competent to determine; they have determined it, and with their determination this Court will not interfere.

The statement of the grounds of appeal ought not to be construed with more strictness than to require a reasonable degree of certainty. The stat. 4 & 5 Will. 4, c. 76, s. 81, requires only the grounds of appeal to be stated, and could never have been intended to require a statement of the constituents of a settlement with all the certainty required in pleadings in estoppel. *Nimia subtilitas in jure reprobat, et talis certitudo certitudinem confundit* (a).

There is greater reason for a favourable construction of the grounds of appeal than of an examination. The former is but at the most a pleading, the latter is both pleading and evidence, and for that reason may be expected to set forth all the incidents of the settlement which is set up. Besides which, a decision on the ground of the insufficiency of the examination would not be final, the respondents could remove again; but, however technical may be the objection to the grounds of appeal, if it be held a fatal one, the order of removal must be confirmed, and an innocent parish be fixed with the maintenance of the pauper. [*Cole-ridge J.* If everything alleged in those grounds of appeal were proved, would a settlement be made out?] By a reasonable intendment put on the language it would. Besides which, the statute requires only "the grounds" of appeal to be stated, and does not say that the essential ingredients of a settlement shall be stated in terms, nor give a definition of what they are, the general law of settlement must be looked to for that. The respondents and appellants do not meet on equal terms, if the same strictness of construction is to be applied to grounds of appeal as to examinations. No objection can be taken to the examination, but such as is raised by the grounds of appeal, which may be considered as a plea to the examination; if that plea points out well-founded objections, the respondents may abandon their order and get a better one; but to the grounds of appeal

there is no replication or pleading; the appellants go to trial in ignorance of the points that may be raised against them, and the respondents have in effect, as to the grounds of appeal, a general demurrer, a special demurrer, and a traverse of every fact stated. Suppose a settlement by renting a tenement had been stated in an examination, as this is in the grounds of appeal, and the grounds of appeal had taken issue upon it in fact, and the sessions had found for the settlement, would this Court have held, after verdict as it were, such an issue immaterial or insufficient; and, if it would not, neither ought they to hold the settlement insufficiently stated here; the appellants ought not to be in a worse condition because there is no issue taken on the grounds of appeal. These questions on examination and grounds of appeal bear no resemblance whatever to pleadings at law, where the contest is narrowed to an issue, where the parties have specific notice of the objection in point of law, and of the contest in point of fact; and where, if the decision is upon a matter of form, the merits are not concluded, but may be tried again.

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Mellor and *I. Spooner* contra were not called upon by the Court.

LORD DENMAN C. J.—Mr. *Daniel* has argued that there is a distinction between this case and that of *The Queen v. The Justices of the West Riding* (a), and there is so in point of fact. The sessions here have found the statement of the grounds of appeal sufficient. But how have they found that question? Subject to the opinion of this Court. They were not bound to grant a case, but they have done so. The grounds of appeal are intended to set up a settlement obtained subsequently to that stated in the examination, but they do not state a complete settlement. I think infinite benefit will be conferred upon parishes by requiring the full particulars of a settlement to be given; and I think we

(a) 1 G. & D. 706.

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ought not to allow the use of words which are contended to be equivalent to those which would accurately describe the settlement.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

G.

Order of Sessions quashed.

The QUEEN v. The Inhabitants of MILDENHALL (a).

An examination stated an order of removal, unappealed against, from the respondent to the appellant parish. It did not state that the order of removal was produced before the removing magistrates, or that any evidence was given to shew that it could not be obtained:—*Held*, that the examination was insufficient.

ON an appeal to the quarter sessions of the borough of Nottingham, against an order of removal by two justices, of *Matilda Roper* and her two children, from the parish of St. Mary, Nottingham, to the parish of Mildenhall, Suffolk, the Court of Quarter Sessions confirmed the order, subject to a case for the judgment of this Court, on the sufficiency of the examinations on which the order was made, which were as follows:

“The several examinations of *Matilda Roper*, now residing in the Nottingham Union Workhouse, in the parish of St. Mary, in the said town, widow, and *Absalom Barnett*, clerk to the Board of Guardians of the Nottingham Union, taken on oath before us, two of her Majesty's justices of the peace in and for the said town, this 16th day of November, 1841, as to her legal place of settlement. The said *Matilda Roper*, upon oath, says as follows; viz. I am 31 years of age, and was born, as I have been informed and believe, in the parish of Saint Mary, in Nottingham. About fourteen years ago, last August, being then a single woman of the name of *Grattan*, I was married at St. Mary's, Nottingham, to *William Roper*, a bricklayer, who died two years ago, the first of last May, in Nottingham, and by him I had two children, *William*, aged eight years, and *John*, aged two years. About seven years ago my husband's father, *William*

(a) Decided in Trinity Term, Saturday, June 4.

Roper, a labourer, was, I believe, removed by order of justices from the parish of St. Mary aforesaid, to the parish of Mildenhall, in Suffolk, and I have not heard of him since; my said husband has not, to my knowledge, done any act since our marriage, by renting a tenement of 10*l.* a year or otherwise, to gain a settlement, and I and my said two children are now chargeable to the parish of St. Mary aforesaid. The said *Absalom Barnett* says, *William Roper*, the father of *Matilda Roper's* said husband, was removed by order of justices, from the parish of St. Mary aforesaid, on the 11th day of June, 1834, to the parish of Mildenhall aforesaid, against which order there was no appeal."

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The material grounds of appeal were—

1. That the said order and examinations are bad respectively on the face of them.
2. That the said order was made without any legal evidence of the alleged settlement of the paupers.
4. That the said *order of removal* in the said examinations mentioned, was *not produced*, or *shewn* to have been *lost or destroyed*.
6. That the order hereby appealed against was made on inadmissible evidence.
13. That no settlement whatever appears on the face of the examinations.

Kelly and *Whitehurst* in support of the order, urged, as was argued in *Reg. v. Stapleford Fitzpaine* (a), that the strict rules of evidence ought not to be applied to the inquiry before the removing magistrates; that it was not, properly speaking, a judicial proceeding; there were not two parties before them; there was no one on whom to serve notices to produce; no one to admit or object to evidence, and that upon the whole the examination was but a preliminary step to a judicial proceeding. They further contended, that, if even such rules were to be applied, sufficient appeared to let in secondary evidence of the order of removal, which it

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was to be presumed was in the possession of the parish who were to be bound by it, that is to say, the parish officers of Mildenhall, that the document therefore being out of the jurisdiction of the removing justices, secondary evidence was admissible, as much as it would be if it were shewn that the document was lost, destroyed, or out of the kingdom.

Biggs Andrews and *Byles* contra were not called upon by the Court.

LORD DENMAN C. J.—There is no presumption as to the custody of this document, nor any reason shewn why it could not have been produced.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

G.

Order of Sessions quashed.

The QUEEN v. The Directors, Guardians, and Assistant-Overseer of the Parish of BRIGHTHELMSTONE (a).

An order of removal cannot be superseded so as to oust the sessions of their appellate jurisdiction, after an appeal has been entered, though that was a mere entry for the purpose of respiting, and though no notice of appeal had been given before such entry and

RULE to shew cause why an order of sessions, brought up by certiorari, by which order of sessions an order for removal of certain paupers was quashed with costs, should not be itself quashed for insufficiency. By an order of two justices, bearing date the 17th May, 1841, *Elizabeth Lish*, widow, and certain her children were removed from the parish of Brighton to the parish of Henfield. The removal under this order actually took place in June. At the general quarter sessions for the eastern division of the county of Surrey, on the 28th June, an appeal by the parish of

(a) Decided in Trinity Term, June 4.

respite, nor until after the twenty-one days following the order of removal had elapsed, and the pauper had been removed to the appellant parish.

Henfield against the said order was entered and respited. The appellants gave the respondents notice on the 1st October of their intention to try and to prosecute the said appeal at the next general quarter sessions. On the 4th October, 1841, the order of removal was superseded by an order of justices of that date. This order, with a notice of abandonment, was served on the appellants on the 8th October. The quarter sessions were held on the 18th October, and were continued on the 19th, when the appeal was called on. Notice of trial was proved, and the respondents stated the order of removal had been superseded by the order of the 4th October, as above mentioned. The appellants objected to the supersedeas being given in evidence, and cited *Rex v. Justices of Middlesex(a)*. The court of quarter sessions, after hearing counsel on both sides, quashed the order of removal. The respondents applied for a special case, but the court refused it.

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Sir F. Pollock, A. G. and Creasy shewed cause. It is contended that the court of quarter sessions had no jurisdiction to quash the order of removal, because it had been already nullified by the supersedeas. But the appeal had been entered at the time of the supersedeas, and the sessions were therefore seised of the appeal, and bound to deliver a judgment upon it. *Reg. v. Justices of West Riding(b)* turned upon the question whether the sessions were right in refusing to enter the appeal, and in that case there had been no entry of the appeal before the order of supersedeas. *Reg. v. Justices of Middlesex(a)* is directly in point; there it was held that a supersedeas after an appeal had been entered, and notice to try given, is void. The sessions being duly possessed of the appeal, some judgment must be given to dispose of it. Suppose the respondents should remove again to a third parish, it would be a good

(a) 3 P. & D. 459; S. C. 11 Ad. & E. 809. (b) 1 G. & D. 630.

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ground of appeal for such a parish, that an appeal upon a prior order of removal was still pending. [*Patteson J.* The order of removal was made on 17th May; no notice of appeal was given within the twenty-one days; the pauper was removed, and the appeal entered and respited by the appellants before the respondents by the notice, and grounds of appeal, had any intimation of any objection to the removal, or to the examination on which it was founded. The legislature intended that the disputing parishes should communicate freely with each other. *Coleridge J.* I understand the Middlesex sessions, since our decision, have adopted a very wholesome practice, of not giving the appellants any costs, when the appeal is entered before notice of appeal given. The sessions seem to have rejected the evidence of the supersedeas altogether. It was material with regard to the propriety of making a special entry of the ground on which the order of removal was quashed.] The evidence does not appear to have been offered in that sense, but only to shew that the sessions had no jurisdiction.

Platt and *A. S. Dowling* in support of the rule. The statute 4 & 5 *Will. 4*, c. 76, s. 79, obviously intended that notice of appeal should be given within twenty-one days after the copy of the examination had been sent to the parish to be charged by it. [*Patteson J.* That fact seems to affect the question of costs only. *Williams J.* Non constat, that they may not discover defects in the examination, or other grounds of appeal after that time. *Coleridge J.* You do not appear to have applied for a special entry of the grounds of quashing the order of removal.] A special entry would not have made any difference, if an order be quashed not on the merits, that may be shewn in a subsequent appeal, in whatever form the judgment of the sessions may have been entered. [*Coleridge J.* A special entry, if not necessary, would at least be evidence of the facts.] But the respondents contend that the jurisdiction

of the sessions to hear the appeal was taken away by the supersedeas. *Patteson J.* said, in *Reg. v. Ecclesall Bierlow* (a), "If a removing party think their evidence will not do, they should abandon their order, and apply for another when they can get better evidence." *Reg. v. Justices of West Riding* (b) is directly in point, and must govern this case. It was there held, that, where parish officers have obtained an order of removal on an insufficient examination, they may procure a supersedeas of the order, although it has been executed, and notice of appeal given, and after such supersedeas the right of appeal is at an end.

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Per *CURIAM* (c).—The case of *Reg. v. Justices of West Riding* is not in point; there it was attempted to compel the sessions to quash a non-existing order; here the order was in existence, and the sessions were properly in possession of the appeal. On the question of jurisdiction the case of *Rex v. Justices of Middlesex* is quite conclusive. Any hardship that has arisen is the fault of the parties who complain. The dates of the proceedings, the facts of the supersedeas and of the notice of abandonment, raised for the sessions a question of costs, and of the terms on which the appeal should be settled. The respondents might also have applied to the sessions to make a special entry that the appeal was disposed of not upon the merits.

G.

Rule discharged.

(a) 1 G. & D. 166.

(b) 1 G. & D. 630.

(c) Lord Denman C. J., *Patteson, Williams and Coleridge Js.*

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The QUEEN v. The Inhabitants of the parish of
TIPTON (a).

In 1822, the pauper was born a bastard in one of several townships in a parish, which had only one set of overseers for the common maintenance of its poor. Subsequently each of the townships had its own set of overseers for the separate maintenance of its poor :—
Held, that the pauper had not gained a settlement in the township of his birth, so as to be removeable thereto from a foreign parish.

ON appeal to the last Midsummer quarter sessions for the county of Stafford, against an order for the removal of *Elizabeth Shaw*, single woman, from the parish of Tipton, in the county of Stafford, to the township of the borough of Hales Owen, in the county of Salop, the sessions quashed the order subject to the following case :

The parish of Hales Owen, at the time of the birth of the pauper, (which took place about twenty years ago, in the workhouse, situate in the town of Hales Owen, in the county of Salop), consisted of the appellant township of Hales Owen, the township of Oldbury, and ten other townships in the county of Salop, and three other townships in the county of Worcester. The three Worcester townships had always had separate overseers, and supported their poor, and managed their parochial affairs apart from each other, and also apart from the rest of the parish, but the other part of the parish of Hales Owen, which is in Shropshire, and which includes the appellant township of Hales Owen, the township of Oldbury, and the other ten townships in the county of Salop, formed a distinct parish from time immemorial up to the year 1832, and never had but one set of overseers, who were annually appointed overseers of the poor of the parish of "Hales Owen in the county of Salop," and who with the churchwardens made a joint rate, which formed one common fund for the relief of the poor, and other parochial disbursements, and of which a joint account was kept, and annually audited in the usual way.

In the year 1832 an application was made to the justices of the county of Salop to appoint overseers of the poor of the township of Oldbury, and, upon their refusing to appoint overseers, the inhabitants of the township applied to the Court of King's Bench, and obtained a rule for a manda-

(a) Decided in Trinity Term, 1842, (May 28).

mus to compel them to appoint overseers for the township of Oldbury, which rule, after argument, was made absolute, and the justices accordingly appointed separate overseers of the poor for the township of Oldbury, and each of the other Shropshire townships, and from that time ceased to appoint overseers of the poor for the "parish of Hales Owen."

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The pauper was born a bastard in the workhouse, which was situate within the appellant township, about ten years before the division of the parish of Hales Owen in 1832, which workhouse was then, and always previously had been, used for the reception and accommodation and maintenance of the poor of the whole of the said parish of Hales Owen in the county of Salop, then consisting of all the said townships, but the pauper's mother at the time of the birth of the pauper was legally settled in that part of the parish of Hales Owen which subsequently became and now forms the distinct township of Oldbury, and at the time of the pauper's birth she was maintained in the workhouse as a pauper of the parish of Hales Owen.

The question for the opinion of this Court, is whether upon the foregoing facts the pauper is settled in the township of Hales Owen in the county of Salop, by reason of having been born in the said workhouse under the circumstances before stated. If she is, the judgment of the sessions to be quashed, and the order of removal affirmed. If not, then the judgment of the sessions to be affirmed.

Corbett, in support of the order of sessions (*a*), contended that neither Hales Owen nor Oldbury had any capacity as separate places of settlement, in respect of any facts which occurred before they became independent townships, but that, if their present capacity did relate back to such antecedent facts, so that the birth of the pauper in 1822 would, under ordinary circumstances, now shew a *prima facie* case of settlement in the township of Hales Owen, then that

(a) The case was argued in Easter Term, 1842, (April 23) before Lord Denman C. J. Patteson, Williams and Wightman, Js.

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case was answered, as under the special circumstances of the birth the settlement would be in Oldbury, by virtue of the 54 Geo. 3, c. 170, s. 3, which provides that the settlement of a child born in a poorhouse shall be in the place from which the mother was sent.

The rest of the argument on both sides is fully gone into in the judgment of the Court.

V. Lee contra.

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court as follows :—The question in this case arises upon the removal by order of two justices of a pauper *Elizabeth Shaw* from the parish of Tipton to the township of the borough of Hales Owen, in the county of Salop. The sessions quashed the said order, and stated a case for the opinion of the Court of Queen's Bench, which is in substance as follows. Previous and up to the year 1832 the parish of Hales Owen consisted of fifteen townships, twelve of which are in the county of Salop, and three in the county of Worcester. The three latter were always independent of the other twelve townships, and of each other, for the purpose of maintaining their poor. The former twelve "from time immemorial (until the year 1832)," constituted one parish, having one set of overseers, and maintained their poor as such *parish*. In the year 1832, by virtue of a writ of mandamus, (on the application of one of the said twelve townships, Oldbury), the said parish of Hales Owen became divided, and all the said twelve townships in the county of Salop have since maintained their poor apart, have had separate overseers, and none have since been appointed for the parish of Hales Owen. About ten years before such subdivision, the pauper was born a bastard, in the parish workhouse in the township of the borough of Hales Owen, and the question is, whether she gained a settlement in the latter township by such birth; and that must depend upon this, how far, before such subdivision, each township ought

to be considered as connected with or independent of the parish for purposes of settlement. Generally speaking they are not so connected: any act, by which a settlement may be gained, has no reference to the township in which it may be acquired, but to the parish only. Whether that settlement was gained in the township of the borough of Hales Owen or Oldbury, or any other of the ten townships constituting the parish of Hales Owen, was before the separation wholly immaterial: it was not a settlement in township A. or B., but in the district, where alone it could be gained, the parish.

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This point has been, to a certain extent, under the consideration of the Court in respect of this same parish and townships. In the case of *Rex v. Inhabitants of Oldbury (a)*, there was an order of removal into that township, Oldbury, and in support of it a former order was produced, removing the pauper into the parish of Hales Owen, against which there had been no appeal. Such latter order was relied upon as conclusive against the *township* of Oldbury, and was held so to be by the Court of Quarter Sessions. This Court however decided, with some hesitation, that it was not; which decision could only have been upon the ground that a settlement in the *parish* is not a settlement in *the whole*, and also in *every part* or township in it; because, if it had been, the sessions were unquestionably right; for if, as was then contended, the proof of a settlement there given applied to the parish and to every township equally, and to the same extent, the order of removal unappealed against would have been conclusive, and all evidence against it inadmissible.

The *decision* in the case of *Rex v. Oakmere (b)*, cited in the argument, was to this effect, that the birth of a pauper in the forest of Delamere, whilst extra-parochial, gained no settlement in the township of Oakmere, which was constituted such township by act of parliament long after; or, in

(a) 4 A. & E. 167; S. C. 5 N.
 & M. 547.

(b) 5 B. & Ald. 775; S. C. 1 D.
 & R. 497.

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other words, that the state of things at the time of the birth was to be considered, and then no settlement could of course be gained. So here, by 54 *Geo. 3*, c. 170, s. 3, the settlement of the pauper at her birth was in the *parish* of Hales Owen, that being the "district on whose account the pauper's mother was received and maintained in the house." The *locality* therefore of the township of the borough of Hales Owen is excluded, and all the townships contributing to the workhouse stand on the same footing. Indeed, independent of the statute, the settlement by birth would have been in the *parish*. That being so, to sustain the order of removal into the *township* of Hales Owen, we must hold that a settlement by birth was gained equally in the *parish* and *each* of the townships composing it, for which we can find no warrant of direct authority or analogy in the law of settlement.

It has been suggested, as a difficulty, that, unless we so hold, the parish, by subdivision, will get rid of settlements, and that persons who would otherwise have gained them may have none. A similar result happened under circumstances nearly the converse of the present, in the case of *Rex v. Inhabitants of Saighton on the Hill* (a). There the pauper had gained a settlement in Saighton, and afterwards in Gloverstone, *then a township*. Afterwards, by certain alterations in the castle of Chester, all the houses in Gloverstone were pulled down, and it ceased to exist as a township. The removal was accordingly into Saighton, as the last practicable place of settlement. The Court, however, decided that the settlement in Saighton was extinguished by that in Gloverstone, though the necessary effect of the decision was to leave the pauper without any settlement at all.

Upon the whole we are of opinion that the decision of the sessions was right, and that their order must be confirmed.

D.

Order of Sessions confirmed.

(a) 2 B. & Ald. 162.

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The QUEEN v. The Inhabitants of DERBYSHIRE.

*Saturday,
January 15th.*

It is not essential to a "bridge," in the legal sense of the word, that it should be a structure over water which flows at all times.

A structure, called "Swarkestone bridge," was 1275 yards long: at the eastern end were five arches, under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed: the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the


INDICTMENT against the county of Derby for the non-repair of a bridge called "Swarkestone bridge." The first count of the indictment was general, for the non-repair of a bridge called Swarkestone bridge. The second, third and fourth counts were for the non-repair of a highway, describing different parts of the highway adjoining the several arches hereinafter mentioned, and within 300 feet of the same. The fifth count was for the non-repair of a highway from the river Trent over the arches: it charged a prescriptive liability of the defendants to repair it. Plea: not guilty.

The judgment of the Court proceeded entirely on the first count of the indictment.

At the trial before Lord Abinger C. B. at the summer assizes, 1839, for the county of Derby, the defendants were found guilty, subject to the opinion of this Court on the following case:—

The structure which forms the subject-matter of the several counts of the indictment is about 1275 yards in length, lies wholly in the county of Derby, and extends from the village of Swarkestone, on the east bank of the river Trent, westerly towards the village of Stanton by Bridge, both in the county of Derby, and the said structure is situate as described in the indictment, and is a common king's highway as stated in the indictment, and is of great public utility. The whole structure contains forty-two arches in all; under the first five of which, at the eastern end, the river Trent flows, and is there 115 yards wide: the last eight arches at the western end are continuous, separated only by piers, and under one of them there is a brook, the water of which always flows. The above five arches are continuous, and separated only from each other

arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge:—*Held*, that it was properly so described, and that the verdict was properly entered for the crown.

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by piers. The other twenty-nine arches are interspersed throughout the space between the eight and five arches, sometimes four or five continuous, and sometimes a single or double arch; but there is in no place a distance of 300 feet between any two arches or sets of arches. Between all the arches, including the eight and the five, there are either piers only or a continuous line of solid stone mason-work on both sides, of the same description, the space between such mason-work being filled up where there are no arches, and over the arches, where there are any, with earth and stones, upon which the road runs, and where the arches adjoin they are connected with buttresses, and a stone battlement, about three feet high, extends from one end of the structure to the other. The structure is very ancient, and before altered as hereinafter mentioned, the whole was of exactly the same style of architecture (gothic, of a peculiar description), and apparently built at the same time and from one design, the arches pointed at the top. From the extremity of the five arches at the east to the commencement of the eight arches at the west end, the structure is carried over low flat meadow land. In times of flood the water flows under all the arches; and under the greater number of arches, between the eight and five arches at the ends, there is always stagnant water, but under the others there is sometimes no water. Before it was widened by the county, as hereinafter mentioned, it was only wide enough for carriages to pass each other in two places, but it has been from time to time so widened by the county that now there are only two places along the whole line at which two carriages cannot pass each other. The whole of the structure, that is, the part containing the twenty-nine arches, as well as the eight and five arches, from beginning to the end, has from all time been called Swarkestone bridge, and the county of Derby have from time immemorial repaired the whole structure, the road and battlements from beginning to end, including the whole forty-two arches, as also the 300 feet at the eastern or

Swarkestone extremity of the same, and have at different times and at a great expense rebuilt and widened twenty-two of the twenty-nine arches between the eight and five arches; also in the years 1795, 6 and 7 they rebuilt the five arches over the Trent. The arches the county have rebuilt are easily distinguished from the others, being circular instead of pointed at the top. Between the year 1685, the first year for which any records of the quarter sessions are preserved, down to 1832, there are upwards of sixty orders relative to the repairs of this structure, in many of which it is called "Swarkestone bridge, being a county bridge."

It appears from the same records that from the year 1760 various parts of the said structure other than the said five arches over the Trent have been frequently presented, under the name of Swarkestone bridge, by the grand jury, as out of repair: and in 1788, being presented, the court ordered that a sum of 336*l.* 8*s.* 10*d.* should be expended by the county in widening and repairing the said bridge, and which sum was expended in widening and repairing that part of the bridge between the eight and five arches; and in 1791 a further sum of 232*l.* 18*s.* 9*d.* was ordered to be expended for the same purpose. At various sessions in 1795, 6 and 7, Swarkestone bridge was presented as being out of repair and necessary to be rebuilt, and various sums, amounting in all to 3550*l.*, were ordered to be raised for that purpose. It was presented in 1808, and the quarter sessions then ordered that the sum of 667*l.* 3*s.* 5*d.* should be raised by the county, and expended in taking down and rebuilding two arches: these are the two round arches near the centre of the plan, the eleventh and twelfth arches eastward from the eight arches, which were taken down and rebuilt accordingly. In 1819 it was presented, and 155*l.* ordered to be expended in the repair of the flood arches and road over them. In 1827 the surveyor of county bridges was ordered to examine "Swarkestone bridge" and the road from thence over the arches to Stanton, and report

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the most eligible mode of repairing the same. In 1828 it was again presented, and an order made for the repair, by the county, of abutments, piers, arches, and spandrils over the two flood arches near the Stanton end of the bridge, being the two arches next eastward of the eight arches. In 1829 Sir *George Crewe* submitted to the sessions a plan for repairing and widening, &c. that part of the Stanton end of Swarkestone bridge ordered to be repaired at a former sessions, with an estimate of the expense, amounting to 400*l.* 14*s.*, and in consideration of the additional convenience, &c. he and other inhabitants of that side of the county offered to contribute half the expense, which offer was accepted. In 1830 it was presented, and 110*l.* ordered to be paid to rebuild the bank parapet wall on the south side, from the said new wall to the pier point at the Stanton end, to fill up the opening of the present road to the new wall, to make the road and work conformable with the adjoining parts of the bridge. In 1831 an order was made to apply to Sir *George Crewe* for payment of 100*l.*, the remainder of the sum of 200*l.*, for which he made himself liable. There are divers other presentments by the grand jury, as well as orders to repair. In 1832, in consequence of the decision of the Queen's Bench in the case of *Rex v. Inhabitants of Oxfordshire (a)*, the county resolved to repair so much only of Swarkestone bridge as is actually over the river Trent and 300 feet at each end of the same. This part, viz. the five arches over the river Trent and 300 feet at each end of the same, is and was at the time of the finding of the indictment in good repair: the remainder then was and still is much out of repair, as stated in the indictment.

It is agreed that the plan annexed (*b*) shall form part of the case. The question for the opinion of the Court is, whether any part of the said structure other than that part

(*a*) 1 B. & Ad. 289, 297.

(*b*) The plan shewed the divisions of the several parts of what was contended to be a bridge, and

exhibited the length of road between the several divisions of arches described in the case.

above stated to be in repair is such a bridge or road that the county are liable to repair.

The case was argued in Hilary term, 1841 (*a*), by *Whitehurst* for the prosecution, and *Willmore* for the defendants.

They cited the following authorities, *stats. Magna Charta*, 22 *Hen.* 8, c. 5, 2 & 3 *P. & M.* c. 8, 5 *Eliz.* c. 13, 39 *Eliz.* c. 23 & 24, 2 *Inst.* 700, *Master of Leonard's case*, cited in margin 2d *Inst.* 700, *Case of the repair of bridges, &c.* (*b*), *Anon.* (*c*), *Austin's case* (*d*), *Rex v. Yarenton* (*e*), *Farrar's case* (*f*), *Rex v. Stoughton* (*g*), *Mayor of Hull v. Horner* (*h*), *Rex v. Liverpool* (*i*), *Rex v. West Riding* (*k*), *Rex v. West Riding* (*l*), *Rex v. Kent* (*m*), *Rex v. St. Giles* (*n*), *Rex v. Ecclesfield* (*o*), *Rex v. Machynlleth* (*p*), *Rex v. Oxfordshire* (*q*), *Rex v. Montague* (*r*), *Rex v. Whitney* (*s*), *Lord Falmouth v. George* (*t*), *Rex v. Sutton* (*u*), *Rex v. St. Pancras* (*x*), *Hale's Hist. C. L.* 4.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—The structure, which forms the subject-matter of this indictment, appears by the case to be 1275 yards in length. At the eastern end are five arches, under which the river Trent flows; at the western end are eight arches, under one of which a brook continually flows. The rest of the space consists of a raised causeway across low meadows,

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(*a*) On Saturday, Jan. 16, before Lord Denman C. J., *Littledale, Patteson and Coleridge* Js.

(*b*) 13 Rep. 33.

(*c*) 1 Ventr. 256.

(*d*) 1 Ventr. 183.

(*e*) 1 Keble, 277, 498, 514.

(*f*) Cited in *Skin.* 78.

(*g*) 2 Saund. 160.

(*h*) Cowp. 102.

(*i*) 3 East, 86.

(*k*) 2 East, 353, n.

(*l*) 7 East, 588.

(*m*) 2 Mau. & S. 520, n.

(*n*) 5 Mau. & S. 260.

(*o*) 1 B. & Ald. 348.

(*p*) 2 B. & C. 166; S. C. 3 D. & R. 388.

(*q*) 1 B. & Ad. 289, 297.

(*r*) 4 B. & C. 598; S. C. 6 D. & R. 616.

(*s*) 3 A. & E. 69; S. C. 4 N. & M. 594.

(*t*) 5 Bing. 286; S. C. 2 M. & P. 457.

(*u*) 5 N. & M. 353.

(*x*) Peake, N. P. C. 286.

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having under it at different points twenty-nine arches. Under most of these arches there are pools of stagnant water at all times, and under all of them the waters of the Trent flow in times of flood.

The county of Derby resists the repairing any part of this structure, except the five arches over the river Trent and 300 feet from the end of those arches, on the authority of the case of *Rex v. Inhabitants of Oxfordshire (a)*.

The present case differs from that of *Rex v. Inhabitants of Oxfordshire (a)* in two respects: First, that it is here found by the case that "the county of Derby have from time immemorial repaired the whole structure, the road and battlements from beginning to end, including the whole forty-two arches, as also the 300 feet at the eastern extremity of the same, and have at different times and at a great expense rebuilt and widened twenty-two of the twenty-nine arches between the eight and five arches;" also, "that from the year 1750 various parts of the said structure, other than the said five arches over the Trent, have been frequently presented under the name of Swarkestone bridge, by the grand jury, as out of repair, and such parts have been repaired accordingly;" whereas in the case of *Rex v. Inhabitants of Oxfordshire (a)*, it was not shewn that the disputed arches had been repaired by the county. Secondly, it appears by this case that there is a constant flow of water under one of the eight contiguous arches at the western end of the structure, which therefore would be a county bridge, independent of their connexion with the arches over the Trent; and also that most of the other twenty-nine arches are over water continually there, though stagnant, whereas in *Rex v. Inhabitants of Oxfordshire (a)*, the disputed arches stood on dry ground, except at times of flood.

We do not consider it necessary to consider the second difference, or to examine whether an arch or number of arches constructed across stagnant water, ought to be treated

(a) 1 B. & Ad. 289, 297.

as constituting a bridge, or whether it is necessary that there should be “*flumen vel cursus aquæ*” for that purpose, because we think that the first difference is sufficient to take this case out of the authority of *Rex v. Inhabitants of Oxfordshire* (a), and to entitle the crown to our judgment.

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That case was tried twice. Upon the first occasion the indictment treated each of the arches as a separate bridge, and the Court held that to be wrong; but Mr. Justice *Bayley*, in giving his judgment, used these words (b)—“It is said that these arches are part of the bridge. There might be strong ground for coming to that conclusion, if it had appeared that they were erected at the same time as the main bridge, or if the inhabitants of the county had from time to time repaired 300 feet of the road beyond these arches, which (if they were part of the original bridge) they would have been liable to do. That is a matter of fact, and ought to have been decided by a jury. We cannot say that they necessarily are part of the bridge, and upon a special case we can only draw necessary conclusions.”

Upon the second occasion (c), the indictment treated the whole as one bridge, and the jury found a verdict for the crown, which the Court set aside as being contrary to the evidence, and ordered a verdict to be entered for the defendants. None of those circumstances which Mr. Justice *Bayley* had mentioned in his former judgment, as forming strong ground for coming to the conclusion that the arches were part of the bridge, were proved on that second occasion.

Here, on the contrary, it appears that the whole structure has from time immemorial been treated as one bridge; that the whole of it, from beginning to end, has been immemorially repaired by the county; and, indeed, that twenty-two out of the twenty-nine arches in dispute have actually been rebuilt by the county. The facts therefore of this case are

(a) 1 B. & Ad. 289, 297.

(c) 1 B. & Adol. 289.

(b) 1 B. & Ad. 299.

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conclusive against the defendants, to shew that the whole structure is one bridge, unless there be some rule of law which, under all and any circumstances, prohibits every part of a structure from being treated as a bridge, under which water does not flow at all times. No such rule of law is to be found, unless it can be deduced from the decision in *Rex v. Oxfordshire (a)*. Looking at all the circumstances of that case, we do not think that any such rule can properly be deduced from that decision, notwithstanding the language used in the latter part of the judgment, and the importance attached to the passage from 2 Inst. 701, and to the use of the words "super flumen vel cursum aquæ" in ancient indictments. Indeed the confining of those words to a constant stream or course of water, flowing at all times, to the exclusion of flood waters, whether rarely or frequently occurring, is not altogether consistent with the doctrine laid down in a case in the same volume of Reports; *Rex v. Trafford and others (b)*. In that case the ancient course and outlet of flood water had been obstructed by certain fenders or banks. And the Court in giving judgment said, "Now it has been long established, that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel, at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction." This view of the law was agreed to by the Court of Exchequer Chamber, as is reported in 8 Bing. 210, though the judgment was reversed from the insufficiency of the special verdict. Now if it be unlawful to obstruct the accustomed course of flood waters which flow only occasionally, it is

(a) 1 B. & Ad. 289, 297.

(b) 1 B. & Ad. 874.

difficult to see why a structure of arches, made to carry a highway in such a manner as to permit flood waters to flow in their accustomed course, should not be treated as a bridge, though at ordinary times there may be no water under them. At any rate where, as in the present case, such arches are contiguous to, and, as it were, in continuation of, an acknowledged county bridge, and have been immemorially treated by the county as part of the bridge, no rule of law prevents our saying that they are so in point of law, as it is obvious that they are in point of fact.

For these reasons we are of opinion that the whole of this structure must be taken to be one county bridge, and that the verdict entered for the crown must stand.

G.

Judgment for the crown.



The QUEEN v. YORK.

QUO warranto information (of Hil. T. 1841) against *York* for usurping the office of councillor of the borough of Bridgewater.

Plea: that he was elected such councillor in November, 1840.

Replication: that, at the time of his alleged election, he had a share and interest in a certain contract with, by, and on behalf of the council of the said borough, and within the meaning of the act of parliament in that case made and provided, in this, to wit, that heretofore, and before, and at the time of the said supposed election, he was the lessee and occupier of certain premises situate in the borough, and belonging to the mayor, aldermen, and burgesses of the borough, by virtue of an indenture under the seal of the mayor, aldermen, and burgesses of the borough, before that time made between the mayor, &c. of the one part and *York* of the other part, by which indenture the mayor, &c. demised to *York*, his executors, &c. the said premises for

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A lease by the mayor, aldermen and burgesses, whether made before or after the passing of the Municipal Corporation Act (5 & 6 Will. 4, c.76,) is a contract by or with the "council," within the 28th section, and disqualifies the lessee for the office of town councillor.

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fourteen years, at a yearly rent thereby made payable by *York* to the mayor, &c. That the indenture contained covenants by *York* to pay rent and all rates, taxes, and to repair, and by the mayor, &c. for quiet enjoyment; that *York* should be allowed to carry away during the term any buildings, &c. built by him during the term, provided that the mayor, &c. should, if they should think fit, at the end or other sooner determination of the term, have power to purchase the same at a valuation. That *York* did, after the commencement of the term, and before the supposed election, build certain buildings upon the demised premises, which are of great value and still standing thereon. That the term is still unexpired, and that the reversion then belonged and still belongs to the mayor, aldermen, and burgesses. That *York* at the time of his election held the premises subject to the above covenants, whereby he was not at the said time a person duly qualified to be elected and to be a councillor of the borough according to the provisions of the statute. Verification.

General demurrer and joinder.

Sir *F. Pollock* A. G. in support of the demurrer (a). The 28th sect. of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, enacts that no person shall be qualified to be a councillor "during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council" of the borough. Unless the word "contract" is confined to such contracts as relate to the "employment" of a person by the town council, the mere acceptance of a compensation bond for loss of office under the 66th sect. will disqualify a person for the office of councillor.

The rest of the argument is fully noticed in the judgment of the Court.

Erle contrà.

Cur. adv. vult.

(a) The case was argued in Mich. term last (Nov. 10), before Lord Denman C. J. Williams, Coleridge and Wightman Js.

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LORD DENMAN C. J. at the sittings after this term (Feb. 5), after stating the pleadings, delivered the judgment of the Court as follows:—Upon the argument two principal questions were raised—1st. Whether this was a contract within the meaning of the 5 & 6 Will. 4, c. 76, s. 28; and 2dly. Whether, assuming that a lease of corporation lands might be a contract within the meaning of the statute, a lease by the mayor, aldermen, and burgesses is a contract “with, by, or on behalf of the council.” Upon both these questions our opinion is in favour of the relator.

We think that the lease was a contract within the meaning of the act, and that it was a contract with or on behalf of the council.

That a lease containing such terms as those in the lease in question is a contract cannot be doubted, but it is said, that the words of the statute being “contract or employment,” such contracts only are intended as partake in some degree of the nature of employments, as contracts for work or the furnishing of supplies, and it was further contended that the proviso that the being “a proprietor or shareholder of any company contracting with the council of the borough for lighting or supplying with water or insuring against fire any part of such borough,” shall not disqualify, shews that the contracts intended by the act were not such as that in the present case.

We think, however, that the meaning of the term contract ought not to be so restricted, but that it should receive its ordinary legal construction. This opinion is rather strengthened by the proviso which excepts certain particular cases, in which the application of the general rule would be inconvenient, and the contemplated mischief not probable. Such a contract as that in question would however, in the hands of one of the council of the borough, let in all the liability to partiality and favour, which it was the object of the statute to prevent.

We also think that a contract with the corporation by its corporate name is a contract with, by, or on behalf of the

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town council within the meaning of the 28th section of the act. By the 6th section corporations are to be styled "mayor, aldermen and burgesses," and the lease in question is in the proper corporate name and under the corporate seal. Whether the lease were granted by the council since the passing of the act or not, in form it would be a lease under the corporate seal and in the name of the corporation. The council as such are not a corporation, nor have the individual members any power to contract as such for the corporation. The council of a borough have a general power by the statute to act for the corporation, and the restraining clause sect. 94 indicates that the council would, but for that clause, have a general power to lease or otherwise dispose of the corporation lands. But the statute gives them no further power, nor indeed means of contracting than as representing the corporation, and what they do must be in the corporate name and under the corporate seal. If the operation of the 28th section was limited to cases of contracts made in terms with the town council it would be ineffectual, as all contracts would be made by the town council in the name of the corporation. The council, as observed by Mr. Justice *Patteson* in the case referred to in the argument of *Reg. v. Paramore (a)*, are *not* the corporation, but, as the council only can enforce or remit the performance of contracts made nominally with the corporation, we think that a contract in the name of the corporation and under the corporate seal is practically, and within the meaning of the act of parliament, a contract with the council, and this whether such contract were made before or after the passing the Municipal Corporation Act; and this view of the case removes the objection taken to the replication, that the time of the demise is not stated, and that it may therefore have been before the passing of the act. Upon the whole, therefore, we think that the judgment should be entered for the crown.

D.

Judgment for the Crown.

(a) 10 A. & E. 286.

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Monday,
January 24th.

THE QUEEN v. THE Mayor and Corporation of NEWBURY.

RULE to shew cause why the prosecutor should not pay the defendant his costs incident to the writ of mandamus in this case (*a*). Upon a concilium on the return the writ itself was held bad.

On a concilium upon a return to a writ of mandamus commanding the defendants to seal a bond for the amount of compensation to the prosecutor, awarded to him by the Lords of the Treasury, under the stat. 5 & 6 Will. 4, c. 76, s. 66, on the abolition of an office, the Court held the writ bad, because it appeared on it that the Lords of the Treasury had no jurisdiction, the defendants having disputed not only the amount of compensation, but the right to any compensation. *Held*, that the Court ought to give the costs of the writ to the defendants.

Whately shewed cause. The costs are in the discretion of the Court, and it will not give them to the defendant in this case, which involved a question of great difficulty, viz. Whether the Lords of the Treasury had any jurisdiction to entertain a claim for compensation, where the right to compensation, and not the amount of it, was in dispute. This was long an unsettled question; *Rex v. Bridgewater* (*b*), *Ex parte Lee* (*c*), *Reg. v. Poole* (*d*), *Reg. v. Norwich* (*e*), *In re Loxdale* (*f*). As late as the case *Reg. v. Lords of the Treasury* (*g*), this Court did no more than express an inclination of opinion that the Lords of the Treasury had no jurisdiction. It was not until this very case that a decision on this point was actually given (*a*).

It has not been usual to grant costs in such cases; *Rex v. Oundle* (*h*), *Rex v. Thames and Isis Navigation* (*i*). In *Rex v. St. Saviour's, Southwark* (*k*), where the Court imposed the payment of costs on the defendants, the ground of the judgment was that there had been an improper if not vexatious opposition to a rightful claim.

Sir *W. W. Follett* S. G. and *J. L. Adolphus* contra. The case *Reg. v. Lords of the Treasury* (*g*) was a clear indication

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| (a) Reported 1 G. & D. 388. | (f) 10 A. & E. 179; S. C. 2 P. & D. 369. |
| (b) 6 A. & E. 339; S. C. 1 N. & P. 466. | (g) 10 A. & E. 374; S. C. 2 P. & D. 498. |
| (c) 7 A. & E. 139; S. C. 2 N. & P. 63. | (h) 1 A. & E. 283; S. C. 3 N. & M. 284. |
| (d) 7 A. & E. 730; S. C. 3 N. & P. 119. | (i) 5 A. & E. 816. |
| (e) 8 A. & E. 633. | (k) 7 A. & E. 948; S. C. 3 N. & P. 354. |

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of what the decision of the point raised in this case would be, and that case was followed by another case of *Rex v. Corporation of Warwick (a)*, which was decided 4th February, 1840. After that this writ went, but the Court gave no opinion that the point ought to be raised on the return. The prosecutor persisted in issuing the writ after a clear intimation by this Court that it was irregular.

Lord DENMAN C. J.—It is so nearly a matter of course that the costs should attend the event, that we ought not to interfere with that consequence, unless some particular circumstances can be shewn to induce us to do so. It does not appear that there are any such circumstances in this case.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

G.

Rule absolute.

(a) 10 A. & E. 336; S. C. 3 P. & D. 429.

Monday,
January 31st.

BRUNE v. THOMPSON.

ASSUMPSIT for tolls. Venue London. The cause of action having arisen in the county of Cornwall, the venue had been removed to that county on the common affidavit, and had been brought back on an undertaking to give material evidence in the city of London. At the trial, before Lord Denman C. J., at the sittings at Guildhall after Michaelmas term, 1841, the plaintiff, in satisfaction of his undertaking, produced certain charters from the Tower of London, but gave no evidence whatever that the Tower, or that part of it from which the charters were produced, was within the city. The plaintiff was nonsuited. Held, that the judge was not bound to take judicial notice of the boundaries of the city of London, and that affidavits were inadmissible, on a motion for a new trial, for the purpose of shewing that the Tower was, in point of fact, within the city.

suit. In the following term, a rule was granted to set aside the nonsuit, and have a new trial, on two grounds:—First, that the judge ought to have taken judicial notice of the boundaries of the city of London, and therefore ought to have known judicially that the Tower was within them; and, secondly, upon affidavits shewing that to be the fact.

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Erle appeared to shew cause, but the Court called upon

Sir *W. W. Follett* S. G., *Cockburn* and *Butt* in support of the rule. It is said on the part of the plaintiff, that material evidence arising within the city was given, and the affidavits now shew that the place of deposit of the charters was within the city. The name implies that it is in fact in the city. But the judge was bound to take judicial notice of the boundary. "The Courts will notice all counties, although they be inferior ones: *Marsh*, 125; 2 Inst. 557, and that a county is co-extensive with a particular town; *Rex v. Baker*, 18 & 19 Geo. 2" (a), though the Court will "not notice the local situations of places within particular counties, or the distance of counties from each other;" *Deybel's* case (b).

Per *CUMMAM* (c). The judge must act upon the case as it appears before him at the trial. Some evidence ought to have been given to shew the fact, that the part of the Tower from which these documents were produced was within the city; none whatever was offered. Then it is urged that the judge ought to have taken judicial notice of the fact, but a court or judge cannot take judicial notice that a precise spot is within a particular county, though it will take notice of the general division of the kingdom into counties. It is said by Lord *Coke* (d), that the "king's

(a) 1 Starkie on Evidence, 446,
n. (s).

(b) 4 B. & Ald. 243.

(c) Lord Denman C. J., *Patterson*, *Coleridge*, and *Wightman* Js.

(d) 2 Inst. 557.

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courts will take notice of all the counties of England, because they be immediate to them for direction of writs."

G.

Rule absolute for a new trial on payment of costs, the undertaking to stand.

*Monday,
 January 31st.*

In replevin a defendant may pay money into court as to a part of the distress and avow as to the residue.

LAMBERT and another v. HEPWORTH and another.

REPLEVIN. *Addison* obtained a rule to shew cause "why the defendants should not be at liberty to pay the sum of 3*l.* 3*s.* into court, by way of compensation or amends as to the taking &c. of the cattle, goods and chattels in the Upper Far Field."

It appeared from the affidavits that the rule was obtained in order to enable the defendants in effect to abandon the distress levied in the close called the Upper Far Field, and upon the cattle in another close, the defendants in respect of the residue of the takings mentioned in the declaration intending to avow, and make cognizance. A judge at chambers had refused to make an order in the terms prayed by the rule, or any other order to the like effect.

W. H. Watson shewed cause. If the defendant pays money into court at all, he ought to pay it into the whole. There is but one taking, and one replevin bond. There is no similarity between this case and an action of trover; in this proceeding the defendant is an actor.

Addison contrà. There may be a bonâ fide doubt whether the close A. was a part of the demise, and whether part of the things, as the horses taken in close B., were liable to be distrained under the circumstances, and the defendant ought not to be prevented from withdrawing from his distress as to such part of it.

Per CURIAM (a). We think that may be done.

(a) Lord Denman C. J., Patteson and Coleridge Js.

1842.

Tuesday,
January 18.

The QUEEN v. ANDERSON.

RULE to shew cause why an information in the nature of a quo warranto should not be filed against the defendant, to shew by what right he claimed to be a burgess of the borough of Ludlow. The rule was obtained upon the affidavit of Mr. *Edmund Lechmere Charlton* that he was of right a burgess of Ludlow; that he was the occupier of a certain dwelling house in the parish of Saint Lawrence, within the town and borough of Ludlow, and within the county of Salop; "that he has directed an application to be made to this Court for a rule to shew cause, why an information in the nature of a quo warranto should not be filed" against the defendant and others; "that the said motion or motions will be made at the instance of this deponent as relator; and that this deponent shall be deemed to be the relator in case such rule shall be made absolute, and shall be named as such relator in such information in case the same shall be filed, unless this Court shall otherwise order."

The facts on which the rule depended sufficiently appear in the judgment of the Court.

Jervis and *Crompton* shewed cause (a). The affidavit purporting to state who the relator is, does not satisfy the rule of Court M. T. 3 Vict. (b) which requires that the person intended to be relator should depose that the "motion is made at his instance as relator," &c. &c. In *Reg. v. Hedges* (c) it was held, that it was not sufficient that the deponent should say, "that it was his intention to be and become really and bonâ fide the relator."

Kelly and *R. V. Richards* contra. The affidavit is sufficient. In *Reg. v. Hedges* (c) the affidavit did not disclose

It is a sufficient compliance by a relator with the R. G. M. T. 3 Vict. to state in his affidavit that he has directed the application for the rule, that the motion will be made at his instance as relator, and that he shall be deemed relator &c.

Under special circumstances, the Court in the exercise of its discretion discharged a rule for an information in the nature of a quo warranto against a burgess, the application being made so late, that it would not be disposed of before another revision of the burgess roll would be had.

(a) Tuesday, Nov. 13, 1841.

(c) 11 A. & E. 163.

(b) 11 A. & E. 2; 3 P. & D. 1.

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at whose instance the application was made, here it does. Mr. *Charlton* states, "that the notice will be made at his instance." On that defect the judgment of the Court in *Reg. v. Hedges (a)* proceeded. The language of this affidavit is more correct than that of the rule of Court itself. Strictly speaking, it is impossible that a man can swear with truth that a motion to be made at some future time is made at his instance.

Per CURIAM (*b*). We think it does sufficiently appear at whose instance the motion is made, and who is to be the relator, and consequently who is to be liable for the costs.

Cur. adv. vult.

WILLIAMS J. now delivered the following judgment of the Court:—This is an information in quo warranto, calling upon *George Brydges Rodney Anderson* to shew by what right he claims to be a burgess of the borough of Ludlow.

From the affidavits in the case, it appears that the said *Anderson* was duly elected, and in due form placed on the burgess roll of the said borough on the 2d of November, 1840. It further appears that in conformity to the 15th sect. of the 5 & 6 *Will.* 4, c. 76, a list was made out on the 5th Sept. 1840, by the overseers of the poor, of all persons claiming to be enrolled on the burgess roll, and that the same was printed and published as directed. Moreover, that, according to the 18th sect., of the act, the mayor and assessors for the said borough did duly revise the said list, and that no objection having been made to the name of the said *Anderson* being retained on the said list, under the provisions of the 17th sect., it was retained accordingly, and the said *Anderson* was duly enrolled on the burgess roll. Such being the provisions of the act which we are considering, so full an opportunity being thereby afforded to examine the right of every person to be upon the burgess

(a) 11 A. & E. 163.

(b) *Williams, Coleridge and Wightman Js.*

roll, and a special power having been expressly entrusted to the mayor and assessors to decide upon the validity of every claim and objection, we think that these provisions have an important bearing upon the question. It seems to us to be impossible not to consider that the many precautions which are prescribed, and in this instance it appears have been pursued, form a strong *prima facie* case, which, in the exercise of our discretion, we ought not, without powerful reasons, to disturb. It was observed, however, that the prosecutor, Mr. *Charlton*, could not avail himself of the checks and precautions of the act, the power of objecting being confined to those "whose names shall have been inserted in any burgess list," which his was not. But it appears that in Michaelmas term, 1839, he obtained a rule absolute for a mandamus to the mayor to insert his name on the burgess roll, and that nothing was afterwards done thereupon. And this also is a circumstance which we think we ought not to overlook. The conduct and motives of relators are always properly before the Court on the rule for the information—and indeed only then properly—and we cannot but see that this is an indirect mode of getting something like a decision in his favour as to his own claim, which he has declined to bring directly into judgment in the manner which the Court placed in his power in 1839. Moreover, although Mr. *Charlton* himself was by his own omission incapacitated, those who were upon the list (many in number doubtless) might have objected, but no one was found to do so. Lastly, this appears to be a question upon the right of a single individual, there being nothing to shew that the validity of the election of any officer, mayor, alderman, or other, depends upon the claim of this person to be upon the burgess roll. If, therefore, Mr. *Charlton* had any reason for questioning the title of Mr. *Anderson*, it might have been at least expected that he should have made his application without such a delay as made it impossible to dispose of it before the revision for another year had taken place.

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Upon the whole we are of opinion that in the exercise of that discretion which is undoubtedly vested in us, we ought to discharge the rule. It will be understood that we by no means decide that an application of this kind may not be successfully made within the year. Our decision rests upon the particular circumstances of this case.

G.

Rule discharged.

FURZE v. SHARWOOD and others.

A. and B. and S. M., in 1832, assigned their stock in trade to trustees, who were to carry on the business in the name of "S. M." alone, for the benefit of creditors. S. M. was employed by them as their agent, to carry on the business accordingly. S. M., while conducting such business, carried on also a separate business of his own up to 1834. The plaintiff had been in the habit of discounting bills for the old firm of A. and B. and S. M., and after the assignment to the defendants had been accustomed to discount bills indorsed in the name of "S. M." for him in his private business and other his private purposes, the proceeds of which S. M. had applied sometimes for carrying on the assigned business and sometimes for his own private purposes. After he had ceased to carry on his private business he indorsed bills in the name of S. M., which the plaintiff discounted. S. M. applied the proceeds indiscriminately to his private purposes and to carrying on the assigned business. In an action on the bills against the trustees,

SPECIAL verdict. The first count of the declaration stated, "that the defendants being persons using trade and commerce under the name and style of *Samuel Maine*, on &c. (27th October, 1834), made their bill of exchange in writing, in, by and under their said name and style of *Samuel Muine*," on *Thomas Cooper*, at six months, for 203*l.* 1*s.* 7*d.*; that *T. Cooper* accepted it, "and then made the same payable and to be paid when the same should become due," "at a certain place described as 147, St. John Street, West Smithfield, London;" that the defendants, under their name and style &c., indorsed to the plaintiff; that the bill was

Held, that the signature of "S. M." to the bills was *prima facie* their signature.

Held, also, that a notice of dishonour, given by the holder of a bill of exchange, need not inform the party addressed that the holder looks to him for payment.

But that it must inform him that the bill has been presented to the acceptor, and therefore that the following notices were insufficient:—

"Sir,—A bill (describing it) due yesterday is unpaid, and I am sorry to say the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to day."

"Sir,—*W. H.*'s acceptance (describing it) is unpaid. He has promised to pay it in a week or ten days."

"Sir,—A bill (describing it) lies due and unpaid at my house."

presented to *Cooper* at the place described, dishonoured, and that the defendant had due notice of the dishonour.

Fourteen other counts were on bills alleged to be drawn or indorsed in the same manner.

There were also the common counts for money lent and on an account stated.

The defendants pleaded traversing the making and indorsing of the several bills.

They pleaded also traversing the notice of dishonour of the bills in the 3d, 4th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th counts.

They further pleaded certain pleas of part payment, and a plea of set-off.

At the trial before Lord *Denman* C. J., at the London sittings after Hilary term, 1839, a special verdict was found (a).

The verdict found that *Thomas Arbuthnot*, *Samuel Maine* and *Robert Kirby*, carried on trade together under the style &c. of *Ware, Arbuthnot & Co.*, at 147, St. John Street, West Smithfield, London; that having become embarrassed, on the 6th February, 1832, they executed a deed of trust for the benefit of their creditors, in order to pay them a certain composition. The deed provided that the partnership should be dissolved, to the intent that it might be thenceforward carried on in the name of the said *Maine* alone. All the stock in trade, &c. was assigned to the defendants, and all suits, debts, &c. upon the trusts that they the said defendants "did and should carry on or continue the trade of the said firm of *Ware, Arbuthnot & Co.* under the name of the said *Sam. Maine*, during such time as they should think proper," and hire workmen and employ servants, &c. "as they should think proper, and should perform and execute all other matters and things for the carrying on the said trade, and for concluding and settling the affairs of the said firm of *Ware, Arbuthnot & Co.*, in the same manner and as fully to all intents and purposes as if they had the absolute

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(a) The verdict was in fact drawn by an arbitrator, who had power to amend it, at any period of the discussion, if the Court should think it necessary.

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property of the said trade and affairs." By this deed *Maine* covenanted "that he would assiduously employ himself in carrying on the said trade or business of &c., under the direction" of the defendants. For such services he was to receive 400*l.* per annum. The defendants under this deed became possessed of the property of the late partnership, and from the date of the deed to the 27th June, 1835, "they continued the said trade of the said firm of *Ware, Arbuthnot & Co.* under the name of *Sam. Maine*," "and did for that purpose, during all that time, employ the said *Sam. Maine* as their agent, for the purpose of carrying on the said trade, according to the provisions of the said indenture."

"*Sam. Maine*, besides carrying on such trade as aforesaid, as the agent of and for the said defendants, did also commence carrying on, upon his own account and for his own profit, the trade and business of a corn factor upon certain other premises in the Strand," "and did continue so carrying on the same until August, 1834, when he sold and disposed of the same to one *George Clisby*." *Sam. Maine*, on the 29th June, 1835, became bankrupt, and the official assignee, *P. Johnson*, was appointed on the 2d July, 1835, according to the statute in that case made and provided. That by an order of the High Court of Chancery, bearing date the 3d day of August, 1835, and made in a certain suit, wherein *Sam. Sharwood* and others (the defendants in this action) were plaintiffs, and the said *Sam. Maine* and others were defendants, the said *P. Johnson* was duly appointed to collect and receive the debts and assets of the said bankrupt, *Sam. Maine*, but without prejudice to any right of any of the parties to that suit. And it was thereby ordered, that the said *P. Johnson* should from time to time pay what he might receive of the trade or business in St. John's Street, and the assets thereof, into the Bank of England, to an account to be entitled 'The matter of *Sam. Maine*, Leather Account.'

And as to the said several pleas of the said defendants, traversing the making and indorsing of the several bills, and as to the issues joined between the said parties in respect

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thereof respectively, that *Sam. Maine*, during all the time that he was such agent as aforesaid, and so employed by the said defendants in carrying on the said trade in St. John's Street, according to the provisions of the said indenture, did make the said several bills of exchange in the said 1st, 2d, 3d, 4th, 7th, 9th, 10th, 11th, 12th, 13th, 14th and 15th counts mentioned respectively, to wit, on the several days and times in those counts respectively in that behalf mentioned, in, by and under the name and style of *Sam. Maine*, the said *George Clisby*, upon whom the said bill of exchange in the said 12th count mentioned was drawn, not then being indebted to the said defendant, or to the said late firm of *Ware, Arbuthnot & Co.*, in respect of the business so carried on by the said *Sam. Maine*, as such agent, so employed by the said defendants as aforesaid.

That the said bills of exchange were respectively entered by the said *Sam. Maine* in certain books, kept by him as such agent as aforesaid, on the said premises, No. 147, St. John Street, aforesaid, and that the said defendants were used and accustomed from time to time, during the time that the said bills were so drawn, and such entries made as aforesaid, to visit the said premises, and on those occasions had opportunities of access to and of examining the said books.

That the said several bills of exchange, as and when the same were so made as aforesaid, were respectively caused to be discounted by the said *Sam. Maine*, and the proceeds thereof were carried by him to his credit, at his bankers; and the said *Sam. Maine* from time to time made use of the said credit, by drawing out the said proceeds from the said bankers, as well for the private purposes of the said *Sam. Maine*, as for and towards carrying on the said trade in St. John's Street aforesaid, indiscriminately, as occasion did or might require (a).

That the said plaintiff, before the dissolution of the said copartnership between the said *Thomas Arbuthnot*, *Samuel Maine* and *Robert Kirby*, had been and was accustomed to

(a) The bills declared upon were made at a later date than August, 1834, when *Maine* ceased to carry on his separate business.

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discount bills drawn or indorsed by the said copartnership for the purposes of their business so carried on in St. John Street as aforesaid, and that after the making of the said indenture, and before the making, indorsing, or accepting the said bills of exchange in the said declaration mentioned, the said plaintiff had also been used and accustomed to advance and lend money to the said *Sam. Maine* for the purposes of his said business as a corn factor or for other the private purposes of the said *Sam. Maine*, and also to discount bills of exchange for *Sam. Maine*, the proceeds of which said discounts had been used and applied by the said *Sam. Maine* sometimes for the private purposes of the said *Sam. Maine* and sometimes for and towards carrying on the said trade, as such agent as aforesaid, in St. John Street aforesaid; and that after the making of the said several bills of exchange in the said first fifteen counts of the declaration mentioned, and whilst the said *Sam. Maine* was such agent as aforesaid, to wit, on the said several days and times in those counts respectively mentioned, he, the said *Sam. Maine*, did indorse the said several bills of exchange by writing on the backs thereof respectively the words "*Sam. Maine*," and, having so indorsed, did then and there deliver the same to the plaintiff, who discounted the same for the said *Sam. Maine*, and the proceeds of such discounts were carried by the said *Sam. Maine* to his bankers, and entered to his credit with them, and the said *Sam. Maine* from time to time made use of the said credit by drawing out the proceeds from his said bankers, as well for the private purposes of the said *Sam. Maine* as for and towards carrying on the said trade in St. John Street aforesaid, indiscriminately as occasion might and did require. That as and when the said bills of exchange in the said declaration mentioned were discounted by the said plaintiff, the fact of the same having so been respectively discounted was from time to time entered by the said *Sam. Maine* in certain books, kept by him as such agent as aforesaid on the said premises in St. John Street, and that the said defendants, during the period within which such bills were respec-

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Your's, &c. John Furze."

(a) The statements in the special verdict as to those bills of exchange, which are not noticed in the judgment of the Court, are omitted.

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As to the said bill of exchange in the 11th count mentioned, the plaintiff did, on the 13th July, 1835, write and send to the said *Sam. Maine* the following notice:

" 65, Fleet Street, July 13th, 1835.

" Sir,—*William Howard's* acceptance for 21*l.* 4*s.* 4*d.*, due on Saturday, is unpaid: he has promised to pay it in a week or ten days. I shall be glad to see you upon it as early as possible. Your's truly, *John Furze.*"

As to the bill of exchange in the said 12th count mentioned, that after *Maine's* bankruptcy the said plaintiff did, on the 11th September, 1835, write and send to *Patrick Johnson*, the official assignee, a notice as follows:

" Sir,—This is to give you notice that a bill for 176*l.* 15*s.* 6*d.*, drawn by *Sam. Maine* and accepted by *George Clisby*, dated May 7th, 1835, at four months, lies due and unpaid at my house.

I am, Sir,

Your most obedient servant,

John Furze.

65, Fleet Street, London."

As to the bill of exchange in the said 13th count mentioned, after the said *Sam. Maine's* bankruptcy, the said plaintiff did, on the 25th September, 1835, write and send to the said *P. Johnson* a certain notice as follows:

" Sir,—This is to give you notice that a bill for 20*l.* 19*s.* 7*d.*, drawn by *Sam. Maine*, accepted by *Rich. Jones*, dated May 21st, 1835, at four months, lies due and unpaid at my house.

I am, Sir, your's obediently, *John Furze.*

65, Fleet Street, London."

As to the bill of exchange in the said 15th count mentioned, after the said *Sam. Maine* had so become bankrupt, on the 26th of September, 1835, the said plaintiff wrote and sent to the said *P. Johnson* a certain other notice as follows:

" *P. Johnson, Esq.*—Sir,—This is to give you notice that a bill for 148*l.* 10*s.*, drawn by *Sam. Maine* and accepted by *George Parker*, dated May 22d, 1835, lies due and unpaid at my house.

I am, Sir,

Your obedient servant, *John Furze.*

Fleet Street, London."

And as to the 45th plea, that the said *Sam. Maine*, after the making of the said indenture, to wit, on the 27th day of May, 1835, did borrow of the said plaintiff, and the said plaintiff did then lend to the said *Sam. Maine*, the sum of 26*l.*, for which said sum of 26*l.* the said *Sam. Maine* then gave to the said plaintiff a certain paper writing in form following, (that is to say)

"I O. U., Mr. *J. Furze*, Twenty-six Pounds. May 27, 1835. *Sam. Maine.*"

That afterwards, to wit, on the 1st day of June, in the year last aforesaid, the said *Sam. Maine* did borrow of the said plaintiff, and the said plaintiff did then lend to the said *Sam. Maine*, the further sum of 120*l.*, for which said last mentioned sum the said *Sam. Maine* did then give to the said plaintiff a certain other paper writing in form following, (that is to say)

"I O. U., Mr. *John Furze*, 1st June, 1835, 120*l.*

Sam. Maine."

That at or before the said times when the said two last mentioned sums of money were so as aforesaid lent by the said plaintiff to the said *Sam. Maine*, it was not communicated by the said *Sam. Maine* to the said plaintiff whether the same or either of them were or was borrowed by the said *Sam. Maine* for his own private purposes, or for the purposes of the said trade so carried on by him as agent for the said defendants.

That the said two several sums of 26*l.* and 120*l.* respectively were in fact borrowed by the said *Sam. Maine* for the purpose of meeting a liability of his own, and not for the purposes of the said trade so carried on by him as such agent as aforesaid, and afterwards, and on the same days as and when they were received by the said *Sam. Maine*, were paid into his bankers to the credit of an account which he kept there in his own name, but from which he was in the habit of drawing money as he wanted it for his own purposes or for those of the trade so carried on by him as such agent indiscriminately, and that the said several

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sums were afterwards, and on the same 1st day of June, drawn out by the said *Sam. Maine* for his, the said *Sam. Maine's*, own private purposes, to meet his liability before mentioned.

That the said loans of 26*l.* and 120*l.* were not, nor was either of them, ever entered in the books of the said defendants, so kept by the said *Sam. Maine* as aforesaid, nor were the said two several paper writings, nor was either of them, ever entered therein (save as aforesaid); the said defendants never authorised the said *Sam. Maine* to borrow the said two several last mentioned sums or either of them, or any part thereof, from the said plaintiff, nor (save as aforesaid) had the said defendants any notice that the same had been borrowed of the said plaintiff, nor (save as aforesaid) did the said defendants ever promise as in the said 16th count mentioned.

The verdict then found a set-off in favour of the defendants to the amount of 615*l.* 3*s.* 8*d.*

The case was argued in Michaelmas Term last (a) by Sir *W. W. Follett* S. G. for the plaintiff, and *Cresswell* and *Cleasby* for different defendants.

In addition to the authorities, which are commented on in the judgment of the Court, as to notices of dishonour, *Burgh v. Legge* (b) and *Phillips v. Gould* (c) were also cited in argument.

Cur. adv. vult.

LORD DENMAN C. J. at the sittings after Michaelmas Term last (February 1), delivered the judgment of the Court, as to the sufficiency of the notices of dishonour, as follows: Lord *Mansfield*, after observing, in the case of *Tindal v. Brown*, (d) that "certainty is of the highest importance in mercantile transactions," proceeded to settle the question there raised, whether the notice of dishonour was in point of

(a) June 16 and 19, before Lord
Denman C. J., *Patteson*, *Williams*
 and *Coleridge* Js.

(b) 5 M. & W. 418.
 (c) 8 C. & P. 355.
 (d) 1 T. R. 167.

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law too late. The whole Court affirmed that proposition, and more than once set aside a verdict founded on the opposite assumption. Nothing more was required for the decision. But Mr. Justice *Willes* took a second objection, and Mr. Justice *Ashurst* a third. "Notice (said Mr. Justice *Ashurst*) means something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay : but" (it ought to be farther said,) "that he the holder does not intend to give credit. In the present case there is no notice ; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser." This is repeated with great approbation by *Buller J.* Near forty years after, the sufficiency of a notice of dishonour was canvassed in *Hartley v. Case* (a), decided by Lord *Tenterden* at Nisi Prius. It ran thus, "I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft by Mr. *Case* on Mr. *Case*, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place."

The report says "the lord chief justice was of opinion that, as this letter did not apprise the party of the fact of dishonour, but contained a mere demand of payment, it was not sufficient, and plaintiff was nonsuited." After argument on a rule for setting aside the nonsuit, his lordship said, "there is no precise form of words necessary to be used in giving notice of dishonour, but the language must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here the letter in question did not convey to defendant any such notice, it does not even say that the bill was ever accepted ; we therefore think the notice insufficient." This short judgment, in which the whole Court concurred, comprising *Bayley*, *Holroyd* and *Littledale* Js. is perfectly correct in its statement of the fact and the law, and has the merit of adhering closely to the point raised in argument. It has never been questioned by any judicial authority.

(a) 4 B. & C. 339 ; S. C. 6 D. & R. 505.

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The same learned chief justice was afterwards called upon to decide on the sufficiency of the following notice. "A bill for 683*l.* drawn by *A.* upon *B.* and *C.* and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. Alzedo*, with directions to take legal measures for the recovery thereof, unless immediately paid to your obedient servants *J.* and *S. P.*" Here was no statement of the dishonour, the presentment, or the acceptance. If any notice of the dishonour, as a distinct fact, is necessary, this document is plainly worthless. It was so holden by Lord *Tenterden*, but from the magnitude of the sum and the importance of the question, his lordship suggested that a bill of exceptions might be tendered. This was done, and the case brought by writ of error into the Exchequer Chamber, when, as might have been expected, the lord chief justice delivered a unanimous judgment that Lord *Tenterden's* direction to the jury was right, and the notice insufficient. It was however thought right to bring the matter before the House of Lords, where the late Mr. Justice *Park* delivered the opinion of all the judges present (nine in number) to the same effect. Thus without one dissentient voice the judges of all the Courts on these different occasions concurred with Lord *Tenterden* in holding express notice of the fact of dishonour to be necessary, the only point on which he had given an opinion. This was the celebrated case of *Solarte v. Palmer (a)*. The lord chief justice in the Exchequer Chamber laid down this rule, that "the notice of dishonour should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount." *Park J.*, when delivering the opinion of the judges to the lords, omits the latter clause, and merely says that "such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonoured." This decision therefore did not turn upon or require any allusion to the doctrine of

(a) 7 Bing. 530; S. C. 5 M. & P. 475; 1 Bing. N. C. 194; S. C. 1 Scott, 1.

Ashurst and *Buller* Js. in *Tindal v. Brown*, on the necessity of stating that the holder looks to the party addressed, and does not give credit to any other person. But much controversy has arisen on the branch of the notice, as to which the lord chief justice and *Park* J. agree, requiring notice of dishonour in express terms, or by necessary implication: and hence the task of examining all the decisions is imposed upon us.

In *Grugeon v. Smith* (a) this Court held the dishonour of a bill to be sufficiently notified by the phrase "the bill is this day returned with charges." A few days after, but without being aware of this decision, the Common Pleas in *Boulton v. Welsh* (b) held the notice insufficient, where it said "the note became due yesterday, and is returned to me unpaid," the lord chief justice there observing that he "did not see how it was possible to escape from the rule established by the two decided cases, (*Hartley v. Case* (c) and *Solarte v. Palmer* (d)), without resorting to such subtle distinctions as would make the rule itself useless in practice. The rule requires that either expressly or by necessary inference the notice shall disclose that the bill or note has been dishonoured." Upon which I will merely observe in passing, that there is no necessary difference of opinion between the two Courts, as *Parke* B. supposed in *Hedger v. Steavenson* (e). The Court of Common Pleas might have held that "returned with charges" did necessarily imply presentment and dishonour. And it does not follow from anything we said that we might not have thought "returned to me unpaid" insufficient.

But the case of *Hedger v. Steavenson* (e) brought the Court of Exchequer into direct collision with the Court of Common Pleas, not indeed on the sufficiency of the notice, (for it was not identical in the two cases), but on the prin-

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(a) 6 A. & E. 499; S. C. 2 N. & R. 505.
 & P. 303.

(b) 3 Bing. N. C. 688; S. C. 4 P. 475; 1 Bing. N. C. 194; S. C. 1 Scott, 1.

(c) 4 B. & C. 339; S. C. 6 D. (e) 2 M. & W. 799.

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ciple of the decisions. The note &c. "has been returned unpaid" was the form which the Common Pleas held wrong, the same form with the addition of "1s. 6d. noting" the Exchequer held right. And *Parke* B. while submitting to the authority of *Solarte v. Palmer* (a) excepts to the reasons given for the judgment and the language in which they are couched, and doubts whether he could go so far as to say that "it ought to appear on the face of the instrument by express words or necessary implication that the bill was presented and dishonoured," thinking "it enough if it appeared by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor and not paid by him." He remarks however that, even if the rule were properly laid down in those words, it ought to receive a more liberal construction than the Common Pleas appeared to have adopted, in which sentiment Barons *Bolland* and *Alderson* agreed, having been two of the judges consulted by the lords, when *Park* J. promulgated their opinion there.

The next case in order of time is *Houlditch v. Cauty* (b): there the general doctrine was discussed, and the lord chief justice declared his adherence to *Boulton v. Welsh* (c), but distinguished the case then before him. The sufficiency of the written notice was not directly in question, for it had been followed by a verbal communication between plaintiff and defendant.

Strange v. Price (d) followed. This Court there held it insufficient to "inform Mr. Price that Mr. B.'s acceptance 87*l.* is not paid." A fortiori, the Court of Common Pleas would have agreed with us. I do not believe that the Exchequer would have differed.

In Easter term, 1840, doubts springing from the same fruitful source were stirred in the Court of Common Pleas

(a) 7 Bing. 530; S. C. 5 M. & P. 475; 1 Bing. N. C. 194; S. C. 1 Scott, 1. (c) 3 Bing. N. C. 688; S. C. 4 Scott, 425.
 (b) 4 Bing. N. C. 411; S. C. 6 Scott, 309. (d) 10 A. & E. 131; S. C. 2 P. & D. 278.

in *Messenger v. Southey* (a), and the Exchequer in *Lewis v. Gompertz* (b), the former condemning, the latter supporting the notice in those respective cases; but the forms were so entirely different that the judgment given might have been consistently formed by either Court. But *Messenger v. Southey* (a) shews a great relaxation of the rigour of the rule laid down in the Exchequer Chamber and House of Lords on the part of the lord chief justice, who admits that *Strange v. Price* (c) may have been well decided, by force of the words "returned with charges," and possibly *Hedger v. Steavenson* (d) also, because the notice declared the bill to have been "returned unpaid." But these are the very words which were held insufficient under the operation of the rule in *Boulton v. Welsh* (e), a case decided by the Common Pleas reluctantly from deference to what was decided in *Solarte v. Palmer* (f), and which can hardly be now deemed a satisfactory authority.

Upon the whole it is to be feared that none of the rules for construing this branch of the instrument, designed to be a notice of dishonour, will be found capable of very general application. The advantage of clear and certain rules, where it can be secured, is indeed inestimable. Perhaps Lord Mansfield never conferred so great a benefit on the commercial world as by his decision of *Tindal v. Brown* (g), where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immediate notice as a matter of law. But in the matter in hand we can scarcely hope to attain such a rule. For if we are to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we can hardly decide it without the intervention of a jury,

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(a) 1 M. & Gr. 76; S.C. 1 Scott N. R. 180.

(b) 6 M. & W. 399.

(c) 10 A. & E. 131; S. C. 2 P. & D. 278.

(d) 2 M. & W. 799.

(e) 3 Bing. N. C. 688; S. C. 4 Scott, 425.

(f) 7 Bing. 530; S. C. 5 M. & P. 475; and 1 Bing. N. C. 194;

S. C. 1 Scott, 1,

(g) 1 T. R. 167,

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whose opinions will naturally vary with the circumstances of each case, and, if on the other hand the Court must decide on the examination of the document, according to legal and grammatical rules of interpretation, we shall frequently give it a sense in which neither party could ever have understood it. If we adopt the middle course, requiring at least a necessary implication, but qualifying these words by Lord *Eldon's* comment in *Wilkinson v. Adam* (a), we have just seen that (if the reports be accurate) the same eminent judge who gave them one sense in *Boulton v. Welsh* (b), may admit them to be susceptible of a sense directly opposite in *Hedger v. Steavenson* (c). This rule, however, was recommended by great authority, twice asserted by the Court of Exchequer, not repudiated by the Court of Common Pleas. Perhaps it goes no farther than to require that the Court must see that, by some words or other, notice of dishonour has been given.

We have entirely excluded the supposition that the mere fact of making a communication respecting the non-payment of the bill at the proper season can extend the meaning of the words conveying notice of dishonour. This exists in almost every case, and, as one can hardly conjecture any other motive for giving the information, so the party addressed can hardly fail to infer that it is given in order to fix him with liability; yet no one disputes that the fact must be stated, and the notice of dishonour plainly given.

But, if this be done, we may now inquire where is the authority establishing the position of *Ashurst* and *Buller Js.* (unnecessary for the case before them,) that the notice must also tell the party addressed that the holder looks to him for payment? If not, why send the notice? True, he may have some other reason for informing the party addressed of the dishonour, while looking elsewhere for his money. But, unless he tells him this, the receiver of such a notice cannot but be certain that the sender means to call upon

(a) 1 Ves. & Bea. 466, cited by Parke B. in *Hedger v. Steavenson*.

(b) 3 Bing. N. C. 688; & C. 4 Scott, 425.

(c) 2 M. & W. 799.

him for payment. The protest for which notice was substituted has no such clause, but begins and ends with the history of the dishonoured bill, including the protest itself. Where notice has been given by another party than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment, or a statement that it will be required of the party addressed, but in no case has the absence of such information been held to vitiate a notice in other respects complete and which has come directly from the holder (a).

Nothing now remains but to declare our opinion on the several forms of notice set forth in the special verdict.

And the second, of July 11; the third, of July 20; and the fourth, of July 13; and the fifth, of September 11; and the sixth, of September 25; and the eighth, of September 26; we think bad, because they contain no notice of dishonour, according to any decisions, or within any of the rules. Consistently with all that is set forth, plaintiff, either from ignorance or inadvertence, or because he may really have looked to another, may have abstained altogether from presenting any one of these bills.

But the amount of these bills reduces the plaintiff's claim below the defendants' set-off. Our judgment must therefore be for the latter, even on the supposition that it would

(a) In *King v. Bickley*, tried before *Wightman J.* at the Middlesex sittings in Trinity term, 1842, the learned judge directed a verdict for the plaintiff, on an issue as to notice of the dishonour of a bill of exchange on which the action was brought. Verdict for the plaintiff, with liberty to move to enter the verdict for the defendant, if this Court should be of opinion that the notice was insufficient, because it omitted to state that the plaintiff, who was the holder, and gave the notice to the defendant, looked to the de-

fendant for payment. The notice, after describing the bill, simply added, "lies at &c. dishonoured."

M. Chambers in the same term (June 2) moved accordingly, and cited *Tindal v. Brown and Solarte v. Palmer*. The Court, consisting of Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js., took time to consider, and on the 9th June Lord Denman C. J. delivered the judgment of the Court, stating that the Court had conferred with the judges of the other Courts, and that the notice was sufficient.

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be against them on all the important general points that have been raised.

Judgment for the defendants accordingly.

After delivery of the above judgment, application was made to the Court in this term with reference to the costs of some of the issues above stated, to decide the general question, which had also been argued, as to the liability of the defendants upon the indorsement of "*Samuel Maine*." The authorities cited in argument upon this point were, *The Bank of Scotland v. Watson* (a), *Ex parte Bolitho* (b), *South Carolina Bank v. Case* (c), *Faith v. Richmond* (d), *Emly v. Lye* (e). [Lord DENMAN C. J. mentioned *Trueman v. Loder* (f).]

Cur. adv. vult.

LORD DENMAN C. J., at the sittings after this term (Feb. 1), delivered the judgment of the Court on this point as follows:—We have already given judgment for the defendants upon the special verdict, on the ground that no sufficient notice of dishonour was given as to the several bills of exchange, the amount of which turned the balance of accounts in favour of the defendants.

But on account of the costs it is necessary for us also to give our judgment upon the other point which was argued, namely, whether the defendants were bound by the indorsements on the bills. They appear to have been trustees under a deed, by the provisions of which they were to carry on a business in the name of *Samuel Maine*; they did so, and employed *Samuel Maine* himself to conduct the business. Their firm therefore, so to speak, was *Samuel Maine*, the indorsement of bills was necessary, and incidental to the carrying on such business. *Primâ facie*, therefore, the signa-

(a) 1 Dow, 40.

(b) Buck, 100.

(c) 8 B. & C. 427; S. C. 2 M. & R. 459.

(d) 11 A. & E. 339; S. C. 3 P. & D. 187.

(e) 15 East, 7.

(f) 3 P. & D. 267.

ture "*Samuel Maine*" was their signature, and they would be bound by it. But it is said that *Maine* carried on a separate business of his own, and that the plaintiff was bound to shew that the indorsements in question were on account of the business of the trustees, and not of his separate business. Now it appears that the bills were discounted with persons who were in the habit of discounting for the former firm, who assigned their effects to the defendants as trustees, and, moreover, that the bills in question were not discounted till after *Maine* had ceased to carry on his separate business. Under these circumstances, we think that the onus of shewing that the indorsements were made on account of the separate business, and not on that of the trustees, which was the general and ostensible business, lay on the defendants. Several cases were cited, which it is not necessary minutely to examine; it is sufficient to say that they are not inconsistent with this view of the present case.

We are therefore of opinion that the defendants were bound by the indorsement of *Maine*, and that the plaintiff, on this ground of objection, would be entitled to our judgment.

Judgment for the plaintiff accordingly.

G. & D.

JONES v. GURDON, Esq.

TRESPASS for assault and false imprisonment. Plea, not guilty (by statute), and issue thereon.

Wednesday,
January 12th.

The 43 Geo. 3,
c. 141, s. 1,
which enacts,
that in all ac-

tions against a magistrate "on account of any conviction, in case such conviction shall have been quashed, the plaintiff, besides the amount of any penalty which may have been levied, shall not be entitled to recover more than 2*d.*, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action, and which shall be an action on the case only, that such acts were done maliciously and without any reasonable and probable cause," does not protect a convicting magistrate from an action of trespass, although his conviction has been quashed, where he has acted without jurisdiction.

Where the convicting magistrate, under 52 Geo. 3, c. 93, sched. (L.), rule 13, which authorises a magistrate, on information or complaint to him, to proceed to hear the same, was not the same magistrate who took the information:—*Held*, that he had acted without jurisdiction, and was liable in trespass, although his conviction had been quashed on appeal.

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SHARWOOD.

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The case was tried before *Patteson J.* at the Suffolk summer assizes, 1840. It appeared that on the 2d October, 1838, an information was laid before *Mr. Dawson*, a magistrate for the county and district commissioner of taxes, against the plaintiff for "being armed with a gun" on that day "in pursuit of game, not being authorised so to do for want of a game certificate." Upon this information *Mr. Dawson* issued a warrant for the plaintiff's apprehension. The plaintiff thereupon absconded and kept out of the way until the March following. He then returned and worked in the neighbourhood from that period until the 28th October, 1839, when he was taken into custody on the above warrant, and carried before defendant, another magistrate for the county and district commissioner of taxes.

A fresh information was then laid before the defendant in respect of the same transaction. This information stated that the plaintiff shot a hare on the occasion mentioned in the previous information.

The defendant convicted the plaintiff under the tax act, 52 Geo. 3, c. 93, in the penalty of 20*l.* and in default of payment, and on the plaintiff's confession that he had no goods, committed him to gaol, which was the trespass complained of.

The conviction was as follows:—

"Be it remembered, that on the 25th day of Oct. 1839, at Assington, in the county of Suffolk, *William Jones* (the plaintiff) of &c. was duly convicted before me *John Gurdon*, Esq. (the defendant) for that he the said *William Jones* did, on the 2d day of October, 1838, on land the property of *Sir Joshua Rowley*, Bart. in the parish of Stoke aforesaid, use a gun for the purpose of taking or killing game, not being authorised so to do for want of a game certificate, contrary to the statute in such case made and provided. The *original complaint* or information against the said *William Jones* for the said offence having been made before *Charles Dawson*, Esq. one of her majesty's justices of the peace and also a commissioner of taxes acting in the exe-

cution of the acts relating to assessed taxes for the district of Babergh in the said county, within *three calendar months* after the commission of the said offence, and I did adjudge the said *William Jones* for the said offence to forfeit and pay the sum of 20*l.*, to be applied in manner directed by the said statute; and as it did appear to me by the confession of the said offender that he had not goods or chattels whereon to levy the aforesaid penalty, I did commit the said *William Jones* to the house of correction at Bury Saint Edmund's in the said county, there to remain for the space of six calendar months, unless the said penalty should be sooner paid, &c. &c."

The above conviction had been quashed at quarter sessions. On the trial of this cause several objections were made to the proceedings which had been taken against the plaintiff. The principal objections were, that no summons had issued against him, and that he could only be convicted within three months after the commission of the offence, and by the same magistrate who heard the original information. It was contended for the defendant that, whether the proceedings were regular or not, the action should have been on the case, according to the 43 *Geo. 3*, c. 141. The learned judge took the opinion of the jury as to the damages to which the plaintiff was entitled, if entitled to a verdict at all. The jury assessed the damages at 10*l.*, and the learned judge nonsuited the plaintiff, with liberty to him to move to enter a verdict for the sum found by the jury.

In the Michaelmas term following, a rule having been obtained accordingly,

Biggs Andrews and *Byles* shewed cause (a). Trespass does not lie against a magistrate in respect of anything done under a conviction, which has been quashed on appeal, but the action must be case. The stat. 43 *Geo. 3*, c. 141, s. 1, which appears from the preamble to have been

(a) In M. T. last (Nov. 11th) before Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js.

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passed for the purpose of rendering magistrates more safe in the execution of their duty, enacts, "That in all actions whatsoever which shall at any time, after the passing of this act, be brought against any justice or justices, &c. for or on account of any conviction by him or them had or made, under or by virtue of any act or acts of parliament in force, &c. or for or by reason of any act, matter, or thing whatsoever done or commanded to be done by such justice or justices, for the levying of any penalty, apprehending any party, or for or about the carrying of any such conviction into effect, *in case such conviction shall have been quashed*, the plaintiff or plaintiffs in such action or actions, besides the value and amount of the penalty or penalties which may have been levied upon the said plaintiff or plaintiffs, in case any levy thereof shall have been made, shall not be entitled to recover any more or greater damages than the sum of twopence, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action wherein the recovery shall be had, *and which shall be in an action on the case only*, that such acts were done maliciously and without any probable cause." There is nothing in this clause to confine its operation to cases where the conviction has been quashed for want of mere form. The protection given to the magistrate is general, whether he has acted with or without jurisdiction. In *Baylis v. Strickland* (a) it was not necessary to determine this point, as it was held that the defendants had jurisdiction. The 43 Geo. 3 in effect makes the situation of a magistrate, where his conviction has been quashed, better than if it were a subsisting conviction: *Gray v. Cookson* (b); for the subsisting conviction will not protect him unless it is good on the face of it, whereas the quashed conviction brings him at once within the statute. The 24 Geo. 2, c. 44, which is in *pari materiâ*, supports this construction. By that act a magistrate is entitled to notice of action for anything "done

(a) 1 M. & Gr. 591; S. C. 1 (b) 16 East, 13.
 Scott, N. R. 540.

in the execution of his office," which words are to be construed liberally, *Chitt. Stat.* 645, n. (1), *Graves v. Arnold* (a), and entitle him to notice, even where he has acted without jurisdiction, if he bonâ fide intended to act in "the execution of his office."

But the defendant had jurisdiction to convict. Under 52 *Geo.* 3, c. 93, Schedule (L), rule 13, it is lawful for two commissioners of taxes, or one justice, being also a commissioner, "within three calendar months after the offence shall be committed, to summon the person or persons accused &c., and upon the appearance of the person or persons accused, or in default &c., to proceed to hear and determine &c." It will be objected that the conviction is bad, because it was not the conviction of the same magistrate who heard the information, and because it did not take place within "three months" after the offence was committed. But it is not necessary that the convicting magistrate should be the same who heard the complaint. Suppose the justice who took the information dies, or is prevented by sickness from proceeding, can there then be no conviction? The 3 *Geo.* 4, c. 23, s. 2, provides that one justice may receive the information where two or more justices may hear and determine. Both justices here were qualified as commissioners of taxes to deal with the offence. With regard to the other objection, the 52 *Geo.* 3 does not require the justice to convict within three months after the offence, but merely to summon within the three months; and it would be absurd that the party should by absconding, as in this case, be allowed to escape punishment altogether.

Kelly and *O'Malley* contra. The 43 *Geo.* 3 does not protect a magistrate from an action of trespass, where his conviction has been quashed, unless he had jurisdiction. The meaning of the statute may be collected by reference to the state of the law at the time of its passing. Before that statute, a convicting magistrate had a complete defence,

(a) 3 *Campb.* 249.

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where his conviction was good on its face, if he had jurisdiction, but, where his conviction was quashed, he was liable in trespass, although he had jurisdiction. The statute then interposed to protect the magistrate to the extent only to which he was deprived of protection by the quashing of his conviction, leaving untouched his responsibility for acting without jurisdiction. This is the construction put upon the act in *Paley on Convictions*, 318 (a). Nothing so absurd could have been intended as that jurisdiction should be necessary to his defence, where the conviction subsisted, and that jurisdiction should not be necessary to his defence where the conviction had been quashed. Although the point now under discussion was not expressly decided in *Baylis v. Strickland* (b), yet it must have been assumed, for the whole argument there was whether there was jurisdiction or not. [*Biggs Andrews*. There was a doubt in that case whether there had been any thing that could properly be called a conviction.]

There clearly was no jurisdiction in this case; there is no authority for saying that one magistrate may take an information and another commit, and it would be most unjust to allow such a proceeding. It is clear also that the conviction must be within three months of the offence. It would be unreasonable that the party charged should be convicted at a period so remote from the period of the alleged offence, that he may have lost the means of proving his innocence.

They also contended that the conviction was bad, because the plaintiff had not been summoned, and went into other objections, which are not material to the judgment of the Court.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action of trespass for false

(a) 3d ed.

(b) 1 M. & Gr. 591: S. C. 1 Scott, N. R. 540.

imprisonment, in which there was a nonsuit, with liberty to move to enter a verdict for the plaintiff for 10*l.*, the amount of damages found by the jury. The plaintiff had been convicted before the defendant, who was a justice of the peace for the county of Suffolk and a commissioner of taxes, and the conviction had been quashed upon appeal at the quarter sessions. The defendant therefore contended that, under the 43 *Geo. 3*, c. 141, an action of trespass would not lie, but an action on the case only, and upon that ground the nonsuit proceeded. The plaintiff contends that the statute 43 *Geo. 3*, c. 141, does not apply where there is a want of jurisdiction, as was laid down in *Massey v. Johnson* (a); and this case turns entirely upon the question, whether the defendant had jurisdiction or not. There were, indeed, several technical objections to the conviction and commitment, but it is unnecessary to notice them.

The conviction was for killing a hare, not having a game certificate, on the 2d October, 1838, and proceeded upon the 52 *Geo. 3*, c. 93, sched. L., rules 1, 12, 13, and was dated on the 25th of October, 1839. Rule 13 provides, in substance, that it shall be lawful for any one justice of the peace, such justice being also a commissioner of taxes, upon information or complaint to him made within three calendar months after the offence shall be committed, to summon the person accused and the witnesses before him, and on appearance or default of appearance to proceed to hear and determine the matter in a summary way, and upon due proof to convict.

It was contended by the plaintiff, that under this rule the conviction must be within three calendar months of the offence, whereas in the present case it was not until more than a year after it. It was answered, that the rule only requires the information or complaint to be within three calendar months, and, in order to shew that the proceedings were correct, the defendant put in the original information, dated 2d October, 1838, the very day when the offence was

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(a) 12 East, 67.

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committed, and a warrant of apprehension (not a summons), dated the same day. This information however was made not to the defendant, but to a Mr. *Dawson*, who was a justice of the peace and commissioner, and the warrant was signed by Mr. *Dawson* only; the plaintiff had absconded on the 2d October, 1838, and did not return until after three calendar months, namely, in March, 1839. He remained at home until the 25th October, 1839, when he was brought before the defendant, having been apprehended upon Mr. *Dawson's* warrant. Passing over the illegality of issuing a warrant, where the rule 13 requires a summons and enables the justice to proceed in default of appearance, and assuming that the limitation of three calendar months applies to the information or complaint only, the question here arises, whether the defendant had jurisdiction to proceed upon the information made to Mr. *Dawson*. It may be conceded that in general, when no provision is made to the contrary, the original information or complaint may be made to one justice, and another may hear and determine the matter. The statute 3 *Geo. 4*, c. 23, s. 2, in the latter part of that section, recognises such a course of proceeding very distinctly. This case, however, depends not upon the general rule or upon the statute 3 *Geo. 4*, c. 23, but upon the words of rule 13, in 52 *Geo. 3*, c. 93, which gives the jurisdiction. The words are, "that it shall be lawful for any one justice, being also commissioner, to summon the person accused to appear before him (not adding "or any other justice and commissioner," or any equivalent words), and upon appearance or default to proceed."


We are of opinion that this rule does not authorise any justice to hear the matter, except that one to whom the information or complaint is made, and that the statute 3 *Geo. 4*, c. 23, s. 2, does not make any difference, inasmuch as that statute contains no enactment that one justice may summon and another hear, but only recognises such a course of proceeding incidentally, the enactment being only that, when the law requires two or more to hear, one only may

take the information. This being the construction which we feel ourselves bound to put upon rule 13, in 52 *Geo. 3*, c. 93, schedule L., it follows that the defendant had no jurisdiction in the particular case, and that the statute of 43 *Geo. 3*, c. 141, does not apply.

This rule must therefore be made absolute, to enter a verdict for the plaintiff for 10*l*.

D.

Rule absolute.

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In re SAWYER.

RULE to shew cause why an affidavit should not be taken off the file, on the ground that the deponent had been convicted of subornation of perjury. The affidavit was made by the deponent for the purpose of shewing cause against a rule, by which an attorney was called upon to answer certain matters alleged against him. The rule having been enlarged, it was filed with the other affidavits.

Saturday,
January 29th.

Where an affidavit was made by a deponent who had been convicted of subornation of perjury, the Court made a rule absolute to take it off the file of the Court.

This rule was obtained on a verified copy of the record of the conviction, and an affidavit of the identity of the deponent. The indictment charged the deponent with having procured a witness to personate another person, and in his name to give evidence on oath in a suit for defamation in the Consistory Court of London. He was convicted and underwent the punishment. In the stat. 9 *Geo. 4*, c. 32, s. 3, which in general restores the competency of a witness, who has been disqualified by a conviction, on his endurance of the punishment, subornation of perjury is excepted.

Sir *W. W. Follett* S. G. *Ings* and *E. James* appeared to shew cause, but produced no authority that an affidavit could be received, made by a deponent so tainted, and,

The COURT (*a*) made the

Rule absolute.

(*a*) Lord Denman C. J., Patteson and Coleridge Js.

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Erle, Thesiger and Warren appeared in support of the principal rule, cause was shewn without using the above mentioned affidavit, and the rule was discharged without costs.

G.

Friday,
January 21st.

MILWARD and others v. HIBBERT and another.

Declaration, by shipowners against underwriter of a time policy upon the hull and stores, alleged that on a certain voyage certain pigs were shipped on board the vessel, and that, from stress of weather, it became necessary, for the preservation of the vessel and her cargo, to throw the pigs overboard, by reason whereof the plaintiffs in respect of their interest in the hull had to pay a proportionable part of the value of the pigs, and sustained a general average loss.

DEBT for 1450*l.* on a policy of assurance, entered into by the defendants as directors of the Mutual Marine Insurance Company.

The declaration stated that by deed poll or policy of assurance of the 20th November, 1837, the defendants, in consideration of the sum of 226*l.* 16*s.* by way of premium, covenanted that the funds of the said company should be liable to pay all such losses and damages as might happen to the subject of the said policy and might attach to the said policy in respect of the sum of 3600*l.* thereby assured, which assurance was thereby declared to be upon hull and stores valued at 10,000*l.*, machinery valued at 10,000*l.*, in all 20,000*l.*, average payable at such valuation of the ship or vessel called the *Kilkenny*, whereof *Price* was then master, lost or not lost, at and from the 28th day of November, 1837, at noon, in port and at sea, at all times, on all occasions and services, until the 28th day of November, 1838, at noon, with liberty to tow and be towed, to return 9*s.* per cent. per month, while laid up, or 10*s.* per cent. for every uncommenced month when cancelled. And the defendants did covenant and agree that the assurance aforesaid should commence upon the said ship at and from or

Plea, that the pigs so thrown overboard had been stowed on the deck, by reason whereof the defendant was not liable to contribute any average loss sustained by their jettison.

Replication, that at the time of the jettison the vessel was on a voyage between Waterford and London, and that the pigs were stowed on deck, according to the usage of the shipping trade between Waterford and London.

On special demurrer to the replication, on the ground that it did not allege that the defendant had notice of the custom, *held*, that the plea itself was bad, as the mere fact of stowing the pigs on deck was no answer to the action.

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as aforesaid, until she had moored at anchor four and twenty hours in good safety at as aforesaid, and that it should be lawful for the said ship or vessel to proceed and sail to, and touch and stay at, any port or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to that assurance. The perils, which the company undertook for, were then set out in the usual form. The policy also contained the usual clause, that corn, fish, salt, fruit, and seed should be free from average unless general or the ship be stranded, warranting sugar, tobacco, hemp, flax, hides and skins free from average under 5 $\frac{1}{2}$ per cent., and warranting all other goods, also the ship and freight free from average under 3 $\frac{1}{2}$ per cent. unless general or the ship be stranded. That the plaintiffs continually, &c. were interested, &c. That the said ship in the policy of assurance mentioned, after the making of the policy of assurance, and during the continuance of the risk in the policy of assurance mentioned, and whilst they were so interested, &c., to wit, on the 19th of February, 1838, departed and set sail on a voyage from Waterford to London, and that after the commencement of the voyage, and during the continuance thereof, and of the risk in the policy of assurance mentioned, and whilst the plaintiffs were so interested, &c. divers goods and merchandise, to wit, 1000 pigs of great value, to wit, of the value of 2000 $\frac{1}{2}$ were shipped and loaded at Waterford in and on board the ship, to be carried and conveyed on freight on board the vessel from Waterford to London. That the ship, whilst she was proceeding on her voyage with the pigs on board, and during the continuance of the risk, and whilst the plaintiffs were so interested as last aforesaid, to wit, on the day and year last aforesaid, by the perils and dangers of the seas and by stormy and tempestuous weather, and the violence of the winds and waves, became and was leaky and greatly strained, damaged, broken, and distressed, insomuch that by means thereof it then and there became expedient and necessary, for the preservation of the vessel and her cargo,

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and for the benefit of all concerned in the vessel and cargo, to lighten the vessel and to cast and throw part of her cargo overboard. That for the preservation of the ship and cargo, and for the benefit of all concerned and interested in the ship and cargo, and in order to lighten the said vessel, the master of the vessel did then and there cast and throw overboard the said pigs and leave them in the sea, whereby they were lost, by reason whereof the plaintiffs, in respect of their interest in the hull and stores and machinery of the said ship, then became liable to bear and did actually pay a proportionable part of the value of the pigs so lost as aforesaid, and thereby sustained a general average loss, to wit, an average loss of 1000*l.* upon the hull and stores and machinery of the vessel so assured and valued as aforesaid, and in consequence thereof the said defendants became liable to pay to the plaintiffs a certain sum of money, to wit, the sum of 450*l.*, being the said defendants' proportion of the said average loss for and in respect of the said sum of 3600*l.* by them assured as aforesaid, of all which said premises the defendants afterwards, to wit, on the day and year last aforesaid, had notice, by reason whereof an action hath accrued to the plaintiffs to demand the sum of 450*l.* from the defendants.

Second plea. That the pigs alleged to have been cast and thrown overboard, before and up to the time of their having been so cast and thrown overboard, had been and were laden and placed in and *upon the deck* of the said vessel, by reason whereof the defendants were not nor are liable to pay or contribute to any average loss sustained by the jettison of the said pigs. Verification, &c.

Replication. That at the same time when the pigs were laden and placed in and upon the deck of the vessel of the plaintiffs, as in the plea alleged, the vessel of the plaintiffs was proceeding on and prosecuting a voyage from Waterford to London; that before and at the time of such loading and placing of the pigs in and upon the deck of the vessel of the plaintiffs, there had been and was, and still is, a cer-

tain known and approved usage and custom of trade touching and concerning the loading of pigs in and on board of vessels trading between Waterford and London, and employed in carrying pigs from Waterford to London aforesaid, that is to say, that the owners of such vessels have had and have been used and accustomed to have, and of right have had, and still of right ought to have, for themselves and their servants the liberty and privilege of loading and placing in and upon the deck of such vessel a reasonable number of such pigs as they from time to time respectively are employed to bring from Waterford to London. That the pigs were before and up to and at the time of their being so cast and thrown overboard as aforesaid, laden and placed in and upon the deck of the vessel of the plaintiffs, in pursuance of and according to the said custom and usage of trade, and the same were a reasonable number in that behalf. Verification, &c.

Special demurrer, on the ground that the replication does not state that the defendants had any notice of the custom therein stated, or that the vessel would be employed in carrying pigs as in the replication mentioned.

Cresswell, in support of the demurrer (a), contended that, where there had been a jettison of a deck cargo, the owner of the cargo was not entitled to contribution by way of general average, because the principle upon which general average rested was, that all the goods on board had been in equal danger, whereas a deck cargo must always be in greater danger than a cargo under hatches, and also impeded the working of the ship: *Albott on Shipp.* by *Shee*, 428; 1 *Park* on *Ins.* 26 (b), and the cases there cited; and the ordinances of Königsberg, Hamburg, and Bilbao, as stated in 2 *Magen's Ins.* 206, 240, 402.

With respect to the usage, relied upon in the replication,

(a) The case was argued in Michaelmas term last (Nov. 9) before Lord Denman C. J. Williams, Coleridge and Wightman Js.
(b) 7th ed.

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of making pigs a deck cargo, he contended that the usage could not avail, as there was no notice of it averred to the defendant, and that notice was the more necessary in this case, because it was an action on a time policy, and not against the shipowner, who was a party, as it were, to the usage, as in *Gould v. Oliver* (a), but against the underwriters. As to the necessity of averring notice of usage, for the purpose of binding a stranger to the usage, he cited *Todd v. Reid* (b), *Scott v. Irving* (c), and *Bartlett v. Pentland* (d).

Sir *W. W. Follett* S. G. contra contended, that the plea, which merely alleged that the pigs were loaded on deck, without saying that they were improperly loaded, did not disclose even a *prima facie* answer to the action, and that, even if it did, the usage, alleged in reply, to make pigs a deck cargo, put them on the same footing with goods not loaded on deck. He contended that it was not equality of danger, but equality of benefit from the jettison, that subjected goods to a general average. He cited *Abbott on Shipp.* part 3, c. 8, s. 13(e), *Da Costa v. Edmunds* (f), *Gould v. Oliver* (g).

He also pointed out that the policy in question was not a mere time policy, but "at all times, occasions and services," and contended that even in the case of a time policy the insurers were as much bound by all the customs which affected voyages covered by the policy, as in the case of a policy for a particular voyage; that no notice of the custom in question need have been either proved or averred, and that it made no difference that the action was by the shipowner against the underwriter, as the underwriter was bound to inform himself of all the usages of trade by which his risk might be influenced. On this part of the case he cited *Pelly v. Royal Exchange Assurance*

(a) 4 Bing. N. C. 134; S. C. 5 Scott, 445.

(b) 4 B. & Ald. 210.

(c) 1 B. & Ad. 605.

(d) 10 B. & C. 760.

(e) 5th ed., p. 355; cited in the judgment, *post*, 148.

(f) 1 Campb. 142.

(g) 4 Bing. N. C. 134; S. C. 5 Scott, 445.

Company (a), Noble v. Kennoway (b), Vallance v. Dewar (c),
and the cases there referred to in n. (a).

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Cresswell replied.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—The declaration in this case was by the owners of a vessel against the underwriters of a time policy on an average loss sustained in the course of a voyage from Waterford to London, wherein it became expedient and necessary from stress of weather, for the preservation of the vessel and her cargo, to throw overboard a part of her cargo, that is to say, 1000 pigs, which were on board, whereby plaintiff became liable to pay, and did pay, a proportionable part of their value, and the defendants thereby became liable to pay that sum to the plaintiff.

One of the pleas to this declaration was, that the pigs had been and were laden and placed in and upon the deck of the said vessel, by reason whereof defendants are not liable to pay or contribute to any loss sustained by the jettison of the said pigs. A replication was pleaded and demurred to, but plaintiff excepted to the plea, and we must see whether it makes out a good defence in law.

The plea assumes that in no case whatever can the ship-owner recover from the underwriter the value of goods loaded on deck. The authority cited for this doctrine is a passage at page 428 of Serjeant *Shee's* recent edition of *Lord Tenterden's Treatise on Shipping*.—"The Consolato del Mare and the French Ordinances exclude from the benefit of general average goods stowed upon the deck of a ship, and Valin, in his commentary on the latter, gives two reasons for this exception. In the first place they ought not to be there, and can only be because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either of which cases

(a) 1 Bur. 341. (b) 2 Doug. 510. (c) 1 Campb. 503.

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he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume that being in the way they will be thrown overboard before the necessity for jettison has occurred, on account of the obstruction they create. But he tells us that this rule does not apply to boats or other small vessels going from port to port, or to trades in which that mode of stowage is sanctioned by custom. The same rule prevails in this country and America. The exceptions to it were recognized by Lord *Ellenborough* in a case between the owner of goods and the underwriter, and more recently the reasoning of Valin has been adopted in the Court of Common Pleas in an action against the owner of a ship to recover contribution to a loss by jettison of goods stowed on deck."

The corresponding paragraph in the text of the fifth edition, p. 355 (the last published during Lord *Tenterden's* life), runs thus :—"The French ordinance in express terms excludes from the benefit of general average goods stowed on deck, and the same rule prevails in practice in this country. Goods so stowed away may in many cases obstruct the management of the vessel, and except in cases where usage may have sanctioned the practice, the master ought not to stow them there without the consent of the merchant." Upon this passage we may remark, that it contains no statement of the exception as a part of either the general law of merchants or the law of England. It is said to prevail in practice in this country, the note adding, "so proved in the causes of *Myer and others v. Vander Deyl*, Guildhall sittings before Lord *Ellenborough*, 1803, and of *Backhouse v. Ripley*, before *Chambre J.* a short time before." No particulars of these cases being preserved, we cannot know in what manner the question was brought on.

In *Ross v. Thwaite*, reported at p. 26 of *Park on Insurance* (a), and tried before Lord *Mansfield* at Guildhall, "an action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved

(a) 7th ed.

was chiefly of goods lashed on deck and the captain's clothes and the ship's provisions. It was proved by an underwriter and a broker that none of these things are within a general policy on goods, for the risk was greater as to goods lashed on deck than other goods, and a policy on goods means only such goods as are merchantable and a part of the cargo. They also swore that when goods like the present are meant to be insured, they are always insured by name and the premium is greater. Lord *Mansfield* said he thought it was consistent with reason, and understood the usage to be so, therefore he advised plaintiff to withdraw a juror, the premium having been paid into Court, to which he consented." When Serjt. *Marshall* copies this report into his treatise (735) he appends this note (a):—"See, however, *Da Costa v. Edmunds*, 4 Campb. 142," where "it was contended for the underwriters that they were not liable, as no communication was made to them of the manner in which the goods were to be carried, and it is a general principle that underwriters are not liable for goods stowed on the deck," for which were cited *Ross v. Thwaite*, *Backhouse v. Ripley*. But "Lord *Ellenborough* left it to the jury to say whether it was usual to carry vitriol on the deck, and whether these carboys were properly stowed. If there was a usage to carry vitriol on deck, the underwriters were bound to take notice of it without any communication, and all they could require was, that the carboys should be properly stowed in the usual manner." Verdict for plaintiff. Rule for a new trial refused.

It is very singular that Lord *Tenterden* does not cite this case, for he expressly lays down the principle on which it was determined; but, before we arrive at the exception to the rule which is here introduced, we must observe on the nature of the rule itself. In the first place, it is the creation of positive regulation in the foreign law alluded to for reasons which may possibly furnish an adequate motive for such enactment. "Goods so stowed," Lord *Tenterden* remarks, "in many cases may obstruct the management of

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the vessel," a reason which is by no means universal, for in many cases it may be that particular goods will be best and most safely stowed on deck. But the most important expression of this accurate and careful writer is that which describes the rule as *prevailing in practice* in this country. For the practice appears to have been, not to lay it down as a rule of law that for goods stowed on deck the owner of them shall be excluded from the benefit of general average, but to receive the evidence of commercial men respecting the usage of the trade, and the general understanding of those engaged in it and in insuring, which may obviously vary and require from time to time fresh evidence, and different explanations. Again, the reasons that may have produced the foreign enactment, and are cited from *Valin*, are by no means adopted by Lord *Tenterden*. He mentions indeed only one of them, the danger of obstructing the management of the vessel, but in extremely qualified terms, "goods so stowed may in many cases obstruct the management of the vessel," a sufficient ground for refusing contribution under particular circumstances, but none for a sweeping forfeiture of all right to recover in respect of goods so disposed.

Lastly, the rule laid down by Lord *Tenterden* includes two exceptions: where usage may have sanctioned the practice, and where the master has the owner's consent to stow them there. The usage would affect the question whoever were the parties, the owner's consent only when it happened to arise between him and the master.

Plainly then the authority of Lord *Tenterden* does not warrant the large statement respecting the English law, which his last learned editor promulges. Indeed this paragraph bears the mark pointed out in the preface as distinguishing his additions to the original work, though it incorporates some parts of that corresponding with it. We may further observe, that the two reasons quoted from *Valin* are not of general application. He says that goods ought not to be stowed on deck, and can only be because the vessel is full without them, or because the master has

neglected to stow them elsewhere, in either of which cases he and his owners are responsible to the shipper, unless the goods were placed there with his consent. 2ndly, Because there is every reason to presume that being in the way they will be thrown overboard before the necessity of jettison has occurred, on account of the obstruction they create. Now it is obvious that there may be other and valid reasons for stowing goods on deck. Indeed some goods could be stowed in no other place, such as timber, and on some voyages live animals, and they may certainly be there stowed with proper skill and care, so as not to be in the way of the crew in their operations. These matters of fact may vary with every different trade, or even with every single adventure. The danger of a crew being tempted to throw overboard goods on deck before the ship is in danger, is quite insufficient; that danger must depend on their weight and bulk, the manner of stowage, and many other particulars, but the argument would prove too much, for it would apply to whatever goods may be nearest at hand, and consequently likely to be the soonest sacrificed. When we say that the reasoning of *Valin* was adopted by the Court of Common Pleas (in the late case of *Gould v. Oliver*(a)), we must confine ourselves to his reasoning in favor of the owner of goods stowed on deck according to the custom of a particular trade, in accordance with Lord *Ellenborough's* decision in *Da Costa v. Edmunds*(b), *Tindal C. J.*, without laying down the rule or the mode of proving it, assuming it to prevail in practice, and only deciding that the owner may notwithstanding recover contribution from the shipowner, where the goods were stowed on deck according to the usage of the trade, for a loss by jettison.

We have then this exception forming part of the rule, and we have seen that *Valin* introduces another, for which there is no very obvious reason, that of boats or other small vessels going from port to port, a description of the size and destination of vessels which may be somewhat difficult

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(a) 4 Bing. N. C. 134; S. C. 5 Scott, 445. (b) 1 Campb. 142.

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of application. But, although this rule of excluding goods stowed on deck from contribution to general average, is not founded on any universal principle, it certainly prevails in practice to a great extent. Serjeant *Shee* truly states that the law is the same on this subject in England and in America, and Judge *Story*, in his valuable edition of *Abbott* on Shipping, proves this proposition by two decisions. The books in which these are reported are not at hand, but we have already shewn that the law of England has stopt very short of the doctrine, that no owner of goods stowed on deck shall under any circumstances be allowed to recover contribution on general average. The question between the merchant and the shipowner may be different from that between either of them and the underwriters, because the former may agree to stow the goods in such a manner that the latter will not be at all responsible for their loss. But it seems to the Court, for the reasons assigned, that the mere fact of stowing them on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation or in any way increase the risk.

D.

Judgment for the plaintiffs.

Thursday,
January 27th.

The notice of appeal against an order of justices, adjudicating on the settlement of an insane pauper, under 9 Geo. 4, c. 40, s. 42, should be given to the clerk of the peace under section 54, and not, under section 46, to the justices who made the order.

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BODKIN, in Michaelmas term last, obtained a rule calling upon the defendants to shew cause why a writ of mandamus should not issue, commanding them to enter continuances, and hear an appeal by the churchwardens and overseers of the parish of St. Nicholas, Deptford, in the said county, against an order of two justices of the 26th May last, adjudging the last legal settlement of *Eliza Rawlings*, a poor insane person, confined in the county lunatic asylum, to be in the said parish.

The order in question, which was set out in the affidavits, recited that in September, 1839, the pauper had been brought before two justices, as "a poor person found and being in the said county of Kent, and chargeable to the parish of Greenwich, within the said county, and deemed to be insane;" that the said two justices, having called to their assistance a surgeon, were satisfied that she was insane, and being unable to ascertain the place of her settlement had directed her to be conveyed to the county lunatic asylum, to be maintained at the expense of the county, where she had been confined and maintained accordingly. The order went on to state that satisfactory evidence had since been obtained on the subject, and then adjudged the pauper to belong to the parish of St. Nicholas, Deptford.

The parish officers of St. Nicholas appealed to the quarter sessions against the order, giving their notice of appeal to the clerk of the peace for the county. When the appeal was called on, it was objected that the sessions could not entertain the appeal, as the justices who made the order appealed against ought to have been served with notice of the appeal, and have been made respondents therein. The sessions allowed the objection, and dismissed the appeal.


Deedes shewed cause. The Court of Quarter Sessions decided rightly, that the notice of appeal against the order should have been given under section 46(a), to the justices

(a) Sect. 42 enacts, "Provided always, and be it further enacted, that where the legal settlement of any insane person, confined under any order of any two justices, at any county lunatic asylum, public hospital, or any licensed house, has not been ascertained, it shall and may be lawful for any two justices, acting in and for the county in which such county lunatic asylum, public hospital or

licensed house is situate, at any time to inquire into the last legal settlement of such insane person; and, if satisfactory evidence can be obtained as to such settlement, it shall and may be lawful for such justices to make an order upon the overseers of the parish or township where such last legal settlement of such insane person shall be adjudged to be, for the repayment of the reasonable charges

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who made the order, and that the notice given to the clerk of the peace under section 54 was bad. The sections of

of the removing, maintenance, medicine, clothing, and care of such insane person, incurred within twelve calendar months previous to the date of such order, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order; and it shall be lawful for the said or any other two justices of the peace of the said county to provide for the future expenses necessary for the maintenance, medicine, clothing, and care of such insane person, in the manner as has hereinbefore been directed for the two justices before whom such person was originally examined."

Sect. 44, "And be it further enacted, that upon its being made known to any justice of the peace, that any person wandering about and at large within his jurisdiction is deemed to be insane, it shall be lawful for such justice, by an order under his hand and seal, if he shall so think fit, to require the constable or churchwardens and overseers of the poor of the parish or place where such person is found, to bring the said person before two justices of the peace of the county, and the said justices are hereby required to call to their assistance a physician, &c.; and if, upon examination of such person deemed to be insane, or from other proof, the said justices shall be satisfied that such person is so far disordered in his senses that it is dangerous for such person to be permitted to go abroad, the said

justices shall make inquiry into the circumstances and place of last legal settlement of such insane person, and it shall be lawful for such justices to proceed in such case, in the same manner as has hereinbefore been directed in the case of a person chargeable to any parish within the jurisdiction of the said justices: provided always, if it shall appear to the said or any other two justices, upon inquiry, that such person hath an estate, more than sufficient to maintain his or her family, they shall, by order under their hands and seals, direct the overseers or churchwardens of any parish or place, where any goods, chattels, land or tenements of such persons shall be, to seize and sell so much of the goods and chattels, or receive so much of the annual rent of the lands and tenements of such persons, as is necessary to pay the charges of removal, maintenance, medicine, clothing and care of such insane person, accounting for the same at the next quarter sessions, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order: provided always, that nothing herein contained shall be construed to extend to restrain or prevent any relation or friend from taking such insane person under their own care and protection."

Sect. 45, "Provided always, and be it enacted, that if any justice of the peace shall refuse to make an

the act from the 38th to the 45th, inclusive, are confined to the cases of pauper and vagrant lunatics, and the 46th

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order for the conveyance of any insane person to any county lunatic asylum, or licensed house for the reception of insane persons, on the application of any overseer of the poor for such purpose, he shall deliver to the said overseer his reasons in writing for such refusal."

Sect. 46, " Provided also, and be it enacted, that, if any person shall feel aggrieved by any order of any justice or justices as aforesaid, such person may appeal to the justices of the peace at the next quarter sessions of the peace, to be holden in and for the county where the matter of appeal shall have arisen, the person so appealing *having given to the justice or justices, against whom such appeal shall be made, ten days' notice* of his or her intention to make such appeal, and the said justices at such sessions are hereby authorised and required to hear and determine the matter of such appeal in a summary way, and to make such determination as they shall think proper, and every such determination shall be final and conclusive to all intents and purposes whatsoever."

Sect. 54, " And be it further enacted, that in all cases where any person shall be kept in custody as an insane person, by order of any court, or by his majesty's order subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such person shall be so kept in custody, to inquire into

and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person, and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order, under their hands and seals, upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody, as one of his majesty's principal secretaries of state shall by writing under his hand from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been apprehended; but, if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expense of the maintenance of such person in the manner hereinbefore directed: provided always, that the churchwardens and overseers of the parish in which the justices, or the major part of them, shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace, to be holden for the county where such order

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section, which gives an appeal, "if any *person* shall feel aggrieved by any order, &c. of any justice or justices as aforesaid," on notice "to the justice or justices against whom such appeal shall be made," must apply to all orders under the preceding sections. The order in this case was made under the 42d section, which provides that, where the settlement of any insane person, confined in the lunatic asylum, has not been ascertained, two justices may at any time inquire into it and make the order. The word "person," in the 46th section, is sufficient to include churchwardens and overseers as aggrieved parties to whom the appeal is given, for, by section 61, "the word '*person*' shall be deemed to include any number of persons." [*Cole-ridge J.* Before this order was made on the parish, the pauper was kept in the asylum at the expense of the county, under section 41, and, if the order should be quashed on appeal, the expense of keeping the pauper will again be thrown on the county; the clerk of the peace, therefore, as the county officer, appears to be the proper person to give the notice of appeal.] It might for the same reason be said that the notice of appeal should be given to the clerk of the peace, whether the order appealed against has been made under the 42d or the 54th section, which would go to shew that the 46th section is altogether inoperative; but the 46th section cannot be passed over. Besides, the justices who make the order are also interested in the proper application of the county funds, and it is usual to require notice of appeal to be given to those whose act is impugned. On the other hand, the 54th section, under which it is said the notice should have been given to the clerk of the peace, begins, "And be it further enacted, that in all cases where

shall be made, in like manner and under like restrictions and regulations, as against any order of removal, *giving reasonable notice thereof to the clerk of the peace of such county*, who shall be respondent in such appeal, which appeal

the justices of the peace assembled at the said quarter sessions are hereby authorised and empowered to hear and determine, in the same manner as appeals against orders of removal are now heard and determined."

any person shall be kept in custody as an insane person, by order of any court, or by his majesty's order subsequent thereunto," obviously, therefore, confining itself to orders respecting criminal lunatics; and the appeal clause, which follows merely as a proviso, and forms part of the same section, must also be confined to the same class of lunatics. The whole section, indeed, is a re-enactment of 48 *Geo. 3*, c. 96, s. 27, which related exclusively to criminal lunatics. The appeal clauses in the act are to be read distributively, each applying to its own particular class of orders. He referred also to 17 *Geo. 2*, c. 5; 51 *Geo. 3*, c. 79; 5 *Geo. 4*, c. 71, and 1 & 2 *Vict.* c. 14, s. 2.

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Bodkin contra was not heard.

Lord DENMAN C. J.—The question is, whether the notice of appeal given in this case to the clerk of the peace, under the 54th section, was a good notice of appeal against an order made under the 42d section. I think it was a good notice, and that the justices should have heard the appeal. The words of the appeal clause, in section 54, are large enough to include this case, and, notwithstanding the position of the section, may relate back to the 42d section. It is said that we cannot leap over the intermediate appeal clause in the 46th section, which will include this case. But I think the 46th section, which gives the right of appeal, "if any person shall feel aggrieved by any order, or by any refusal of an order," applies only to the cases in the 44th and 45th sections—the cases of lunatics wandering about the country, and to other cases, where an *individual* is affected by an order or by the refusal of an order. The present is not such a case, but involves a question between the parish, upon which the order to maintain the pauper has been made, on the one hand, and the county on the other, upon which the burden of maintaining the pauper will be cast back, if the order is quashed. The appellants in the case are the churchwarden and overseers of the parish, and

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the county is represented by the clerk of the peace, as its officer. The clerk of the peace would seem to be the proper party to receive the notice on behalf of the county. As there are particular cases under sections 44 and 45, to which the appeal clause in section 46 may refer, and as the county fund is equally concerned, whether the case is under section 42 or section 54, it seems reasonable to hold that this notice to the clerk of the peace, under the 54th section, is good.

PATTESON J.—I am of the same opinion, though the case is not free from difficulty. I think, however, that the appeal clause in the 54th section applies to orders made under the 42d section, and that there is no difference, in this respect, between criminal and pauper lunatics; in either case the contest is between the county and the parish. Section 46 appears to apply to the cases in the 44th and 45th sections only. There is certainly some difficulty in this construction, for, if under section 44 the vagrant has been adjudged to be a settled pauper, and the order should be appealed against, there seems just as good reason why the clerk of the peace should be respondent in that case, as if it were a case under the 54th section, for there is the same interest on the part of the county, and the same absence of interest on the part of the justices in both cases.

COLERIDGE J.—I am of the same opinion. Sections 44, 45 and 46, seem isolated from the rest of the act. Under sections 44 and 45, individual interests are concerned either by the making or refusing an order, which adjudges a party to be disordered in his senses, and that his property may be seized. There is therefore abundant room in such cases for individual grievance, and it is right that the justices should have notice of appeal against their order. The appeal clause, therefore, in section 46, has something to act upon, without reference to the 42d section. In a case like the present, the interested parties are the parish on the one

hand and the county on the other. It is therefore reasonable that the clerk of the peace, who represents the county, should have the notice.

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WIGHTMAN J. concurred.

D.

Rule absolute.

COOCH and KIPLING v. GOODMAN.

Tuesday,
January 18th.

COVENANT. The declaration stated that on the 25th March, 1831, by a certain indenture then made between the Rev. J. G. Durham, Edmund Goodwin, Henry Van Hagen, and the plaintiffs, of the one part, and the defendant of the other part (profert of the indenture sealed by the defendant), the said Durham and others, and the plaintiffs, for the considerations therein mentioned, demised to the defendant, his executors, &c. certain tenements, for the term of ten years, at a certain rent, &c. That the defendant by the said indenture covenanted for good husbandry, and to

A declaration in covenant by A., B. and C., stated, that by indenture they demised certain premises to the defendant for a term; that the defendant covenanted to yield up the premises in good repair at the end of the

term. Breach, that at the end of the term he yielded up the premises out of repair.

The defendant on oyer set out the indenture, which appeared to be made between A. the master, and B. and C. the governors of a hospital of the one part, and the defendant on the other part. It stated that the "master and governors" had demised the premises to the defendant, and that the covenant in question was made with the said "master and governors and their successors;" and it also contained covenants by the "said master and governors, for themselves and their successors," and concluded thus, "In witness whereof the said master and governors have hereunto affixed their common seal." A seal, purporting to be a common seal, was affixed on the part of the lessors, and the deed purported to have been signed, sealed and delivered by the defendant.

The defendant then pleaded that the indenture was not signed by the plaintiffs or their agent, lawfully authorised by writing, and that there was no demise of the premises signed by them or their agent, lawfully authorised by writing.

Special demurrer to the plea, on the ground that it was an argumentative denial of the plaintiffs' right of action, and of the validity of the indenture of demise.

Held, That it appeared by the record that the lease was made by a corporation, and that no action could be maintained upon it in the names of the plaintiffs.

That, though the names of the members of the corporation were mentioned in the indenture, those persons, as individuals, could not be considered as parties to it, because, independently of the form of the covenants and the concluding clause, "in cujus rei testimonium," the seal professed to be the seal not of individuals, but of a corporation.

Seemle, that if the plaintiffs, as individuals, had appeared to be parties to the indenture, the want of execution by them would have been no answer to the action.

Quere, whether it is necessary by the Statute of Frauds, that a lease under seal, for more than three years, should also be signed.

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keep the premises during the term in good repair, and to yield them up at the end of the term in like repair. That the defendant, by virtue of the demise, entered and was possessed of the premises until the end of the term. That during the term, and before action, *Durham* and the other two parties of the one part died. Breach, that the defendant during the term injured the premises by bad husbandry, and also neglected to repair, and yielded up the premises out of repair at the expiration of the term.

The defendant set out the indenture on oyer, as follows: "This indenture, made &c., between the Rev. *George Durham*, vicar of Newport Pagnell, in the county of Buckingham, and master of the hospital there long since founded by the name of Queen *Anne's Hospital*, *Edmund Goodwin*, of &c., *Henry Van Hagen*, of &c., and *Charles Hoddle Kipling*, of &c., governors of the said hospital, of the one part, and *Daniel Goodman* (the defendant) of the other part, witnesseth that, for and in consideration of the yearly rent hereinafter reserved, and of the covenants, articles and agreements hereinafter contained, which, on the part of the said *Daniel Goodman*, his executors, &c. are respectively to be paid, done, kept and performed, they the said master and governors have demised, &c." the premises in the declaration mentioned. This indenture contained the covenant relied upon in the declaration, which purported to be made with the said master and governors and *their successors*, and it also contained covenants by the "master and governors and *their successors*," and concluded "In witness whereof the said master and governors have hereunto affixed their common seal, and the said *Daniel Goodman* (the defendant) hereunto set his hand and seal, the day and year first above written."

The common seal (L.s.) affixed. The mark X (L.s.) of the above-named *Daniel Goodman*.

The common seal of the within-named master and governors affixed, and signed, sealed and delivered by the within-named *Daniel Goodman*, in the presence of, &c.

The defendant then pleaded (2d plea) that the said indenture was not at any time during the said term of ten years, in the said indenture and declaration mentioned, signed by the said *J. G. Durham, E. Goodwin, H. Van Hagen*, and the plaintiffs, or any or either of them, or by any agent or agents of the said *J. G. Durham, E. Goodwin, H. Van Hagen*, and the plaintiffs, or any or either of them, thereunto authorised by writing, nor was there any demise or lease of the said tenements or premises in the said indenture mentioned, for the said term of ten years, put in writing and signed by the said *J. G. Durham, E. Goodwin, H. Van Hagen*, and the plaintiffs, or any or either of them, or by any agent or agents of the said *J. G. Durham, E. Goodwin, H. Van Hagen*, and the plaintiffs, or any or either of them, thereunto lawfully authorised by writing. Verification.

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Special demurrer, on the grounds that the plea confesses but shews nothing in avoidance of the causes of action in the declaration contained, but takes issue on matter wholly irrelevant and immaterial, and on matter of law; also, that the plea is an argumentative denial of the plaintiffs' right of action, and of the validity of the indenture of demise set out by the defendant; and also, that the plea admits that the defendant signed and executed the indenture, and entered into and occupied the premises during the whole of the term, but shews nothing in discharge of the covenants, or in excuse for the non-performance of them by the defendant; also, that the defendant has not in and by the plea confessed and avoided or traversed or denied the substantial matter in the declaration contained.

Joinder in demurrer.

The case was now argued (a) by *Robinson* in support of the demurrer, and by *W. H. Watson* contra. The argument is fully stated in the judgment.

Cur. adv. vult.

(a) Before Lord Denman C. J., Patteson, Williams and Coleridge Js.

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Lord DENMAN C. J., at the sittings after this term (Feb. 5), delivered the judgment of the Court as follows:— This was an action of covenant brought by the plaintiffs, as survivors of three other persons, for the breach of certain covenants in a lease. The defendant set out the whole deed upon oyer, and pleaded first, *non est factum*; secondly, that the indenture was not signed by the plaintiffs and the deceased persons, or any agent of them, nor was there any demise put in writing and signed by them or their agents.

The plaintiffs demurred specially. The indenture, as set out on oyer, professes to be made between *J. G. Durham*, clerk, vicar of Newport Pagnell, and master of Queen Anne's Hospital there, and four other persons by name (two of them being the plaintiffs), and described as governors of the hospital, of the one part, and the defendant of the other part. It is thereby witnessed, that the said *master and governors* have demised and do demise: the covenants by the defendant are made to and with the said *master and governors and their successors*, and the covenants by the lessors are by the said master and governors, for themselves and their successors. The indenture concludes in these words, "In witness whereof, the said master and governors have hereunto affixed *their common seal*, and the said *D. Goodman* hath hereunto set his hand and seal, the day and year first above written." It appears therefore by the record, that the lease in question is made by a corporation, and, if so, no action can be maintained upon it in the names of the present plaintiffs, and the defendant is entitled to our judgment upon that ground.

But it is said that, as the names of the members of the supposed corporation are mentioned in the indenture, those persons as individuals may be considered as parties to the indenture, notwithstanding the form of the covenants and of the concluding clause "*in cujus rei testimonium*," and both sides on the argument agreed that no such corporation really existed. We do not agree to this view of the case; but we will proceed to consider the questions which arise, supposing it to be the correct view.

The first question is, whether it is necessary, by the Statute of Frauds, that a lease under seal should also be *signed*. The words of the 1st section are, "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, to or out of any messuages &c., made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorised by writing, shall have the force and effect of leases or estates at will only." The plea in this case is framed in the very words of the plea in the case of *Cardwell v. Lucas* (a), in which it does not seem to have occurred to the Court or the counsel, that the words "signed by the parties," &c. might apply only to instruments not under seal. It is now argued that, inasmuch as the previous words are "made or created by livery and seisin only, or by parol," the distinction apparently intended to be established by the Statute of Frauds was between estates or interests created by a formal instrument, and those created by mere matter in pais, which must be established by the fallible recollection of witnesses. Mr. Justice *Blackstone*, in his Commentaries, vol. ii. p. 306, lays it down that the Statute of Frauds has restored the old Saxon form of *signing*, and superadded it to sealing and delivery, in case of a deed. Mr. *Preston*, on the other hand, in his edition of *Sheppard's Touchstone*, fol. 57, n. (24), treats this passage in *Blackstone* as a mistake from not attending to the words of the statute, and holds it clear that no signature is necessary in the case of a deed. It is curious that the question should now, for the first time, have arisen in a court of law, and perhaps as curious that it is not necessary now to determine it, for, although the plea negatives signature only, and not sealing or delivery by the plaintiffs and the deceased, yet it appears by the indenture, as set out on oyer and thereby become part of the declaration, that it was not sealed by the plaintiffs. It is true that one piece of wax may serve as a seal for several persons, if

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(a) 2 M. & W. 111.

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each of them impresses it himself, or one for all, by proper authority, or in the presence of all, as was held in *Ball v. Dunsterville and another* (a), following *Lovelace's* case (b), but then it must appear by the deed and profess to be the seal of each, whereas here the seal appears by the deed and professes to be the seal not of individuals, but of a corporation. Therefore, without determining what is the proper construction of the Statute of Frauds, we see by this record that the indenture was not executed by the plaintiffs and the deceased, which raises the principal question intended to be argued, namely, whether, notwithstanding the want of such execution, they can sue the defendant, who has executed, for breaches of covenant.

In discussing this question, the covenants must be taken to have been made by the defendant to and with the plaintiffs and the deceased, which takes this case out of the authority of *Berkeley v. Hardy* (c). It is also distinguishable from *Cardwell v. Lucas* (d) on the one hand, and from *Rose v. Poulton* (e) on the other; from the first, because that was an action by the assignee of a supposed reversion, whereas the lease not having been executed by the lessor, no interest passed by it to the defendant, and there was no reversion expectant upon it which could be assigned; from the latter, because in that case the covenants were in gross, unconnected with any interest in land, and in no way incident either to the possession of, or reversion in, another thing. In other respects the case of *Cardwell v. Lucas* (d) is similar to the present, for there, as here, it appeared by the record that the defendant had entered and enjoyed the premises for the whole of the term mentioned in the indenture, and the Court, in giving judgment, by no means exclude the supposition that that circumstance might have sustained the action, if it had been between the immediate parties to the deed. Neither does the case of *Soprani v.*

(a) 4 T. R. 313.

(d) 2 M. & W. 111.

(b) Sir W. Jones, 268.

(e) 2 B. & Ad. 822.

(c) 5 B. & C. 355; S. C. 8 D. & R. 102.

Skurro (a) exclude such supposition; for that was an action of *assumpsit*, and the consideration had clearly failed, though it must be admitted that the report of the decision lays the law down broadly, that, if the lessor does not execute a lease, no interest passes, and the deed is void, and the covenants, as covenants, void also. It should however be observed, that a covenant, being under seal, does not by law require any consideration to support it, and, though an illegal consideration may be shewn and will vitiate it, and, if a consideration be stated on the face of a deed, a different one may be proved in order to raise a legal defence, yet a mere failure of consideration, which once existed, may have no more effect than a total want of consideration in the first instance. Several cases are cited in *Com. Dig.* tit. *Covenant* (F), to shew that under circumstances a failure of consideration will prevent an action of covenant from being maintainable, and we are by no means prepared to deny this proposition. But in the present case there has not been any such failure, and therefore we are of opinion that the case comes within the general rule laid down in *Com. Dig.* *Fait*, (C 2), and the cases there cited, namely, that, if one party executes his part of an indenture, it shall be his deed, though the other does not execute his part.

Upon the whole, therefore, we are of opinion that the want of execution by the plaintiff is no answer to this action; but, as before stated, we cannot fail to see upon this record that the demise is apparently by a corporation, and, as we cannot judicially notice that no such corporation exists, we are of opinion that the action is brought by the wrong parties, and that the defendant is entitled to our judgment.

D.

Judgment for the defendant.

(a) *Yelv.* 18.

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Defendant, being indebted to plaintiff on two overdue bills of exchange, gave the following written undertaking, "In consideration of your not proceeding on the bills, I hereby debar myself of the Statute of Limitations in case of my being sued for the recovery of the amounts of said bills, and I hereby promise to pay them whenever my circumstances enable me to do so, and I may be called upon for that purpose" In an action on the agreement where issue was joined on a plea of the Statute of Limitations:—
Held, that the Statute of Limitations began to run as soon as the defendant became of ability to pay, although the plaintiff had had no notice or knowledge of such ability, and had made no demand of payment.

R. F. WATERS, Administrator of EDMUND WATERS,
v. The Earl of THANET.

ASSUMPSIT. First count, on a bill of exchange for 658*l.*, drawn by defendant the 9th August, 1802, upon one *Wilson*, and accepted by him, payable six months after date, and indorsed by the defendant to one *Tabe*, and by him to the plaintiff's intestate, *Edmund Waters*.

Second count, on a bill for 465*l.* 13*s.* of the same date, and in other respects the same as the bill in the first count.

The third, which was the material count, stated that *Edmund Waters*, the intestate, was the holder of the two bills above mentioned, which at the time of the promise, &c. were overdue and unpaid, whereof the defendant had notice, and thereupon afterwards, to wit, on the 13th August, 1803, in consideration that *Edmund Waters*, at the request of the defendant, would not proceed against the defendant for the recovery of the amount of the said two bills until the circumstances of the defendant enabled him to pay the same, the defendant then promised *E. Waters* to debar himself of all future plea of the Statute of Limitations, in case of his being sued for the several amounts of the bills and of the interest accruing thereon, and that he would pay them separately or conjointly, with the full amount of legal interest on each and both of the bills, whenever he might be called upon for that purpose, and his circumstances should enable him to pay the same. Averment, that *E. Waters* did forbear to proceed until the 30th November, 1838, and did forbear till the 23d November to call upon the defendant for payment, when he called upon defendant and required him to pay. That, although, at the time when he was so called upon for payment, the circumstances of the defendant enabled him to pay, he had not paid either to *E. Waters* or the plaintiff.

Fourth count for interest.

Pleas: 1. As to the third and fourth counts, non assumpsit. 2. To the whole declaration, actio non accrevit infra sex annos.

Replications, joining issue on the first plea, and, to the second plea, that in the lifetime of *E. Waters*, to wit, on the 30th November, 1838, *E. Waters*, in respect of the causes of action in the declaration mentioned, commenced an action in the Queen's Bench, to which the defendant appeared and pleaded; that *E. Waters* died in October, 1839, during the pendency of the suit, whereby it abated; that on the 30th December, 1839, the plaintiff, as administrator of *E. Waters*, commenced his action for the same causes of action, and that the said causes of action accrued to *E. Waters* within six years before the commencement of the first action.

Rejoinder, that the said causes of action did not accrue to *E. Waters* within six years before the commencement of the action by him.

Issue thereon.

The cause was tried before Lord *Denman* C. J., at the Middlesex sittings after Michaelmas term, 1840. The plaintiff put in evidence the bills and the following agreement, purporting to be signed "*Henry Tufton*," being the name of the defendant before he became a peer.

"London, April 13th, 1803.

"In consideration," &c. (stating an agreement by *E. Waters* not to proceed against the defendant on the two bills then overdue), "I hereby debar myself of all future plea of the Statute of Limitations, in case of my being sued for the recovery of the amounts of the said bills, and of the interest accruing thereon at the time of my being so sued; and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each and both of them, whenever my circumstances may enable me to do so, and I may be called upon for that purpose."

Contradictory evidence was given as to the signature to the agreement being in the handwriting of the defendant. It appeared that the defendant became of ability to pay in

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1825, and succeeded to his present title in April, 1832, but *E. Waters*, who had resided in France for many years before his death, appeared to have had no knowledge of such ability until a short time before the commencement of his action, when he accidentally discovered that "*Henry Tufston*," the drawer of the bills in question, had become Lord *Thanet*. Demand of payment had been made on the 23d November, 1838, and the first action was commenced on the 30th of the same month. His lordship was of opinion that, under the circumstances of the case, the Statute of Limitations was no defence, and the plaintiff had a verdict on the third count for 3237*l.* 2*s.* 7*d.* Leave was given to the defendant to move to enter a nonsuit.

Sir *J. Campbell* A. G., in Hilary term, 1841, obtained a rule nisi accordingly, on the ground that the right of action accrued as soon as the defendant became of ability to pay, whether such ability were known to the plaintiff or not, and without demand of payment on his part, so that the Statute of Limitations was a bar to the action.

Sir *W. W. Follett* S. G., *Thesiger*, and Sir *J. Bayley* shewed cause (a). The question arises on the third count only, which is not framed to recover the specific amount of the bills, but to recover damages for the breach of a special agreement. *Christie v. Fonsic* (b), therefore, where it was held, in an action to recover the amount of a promissory note payable on demand, that the Statute of Limitations ran from the date of the note and not from the demand of payment, is inapplicable. Here the payment of the bills in question is collateral to the agreement, and no cause of action would arise until the defendant had been called upon to pay them. A demand, therefore, was as necessary to found a cause of action as if the agreement

(a) At the sittings after last Michaelmas term (Nov. 26) before Lord Denman C. J. *Williams, Col-*

ridge and Wightman Js.

(b) 1 Selw. N. P. 352 (10th ed.)

had been that the defendant would go to Rome "when called on" or would pay a sum of money to any third person. Suppose, instead of agreeing to pay the amount of these particular bills, the defendant had agreed to pay a sum of money, without reference to these bills, he would not be liable until called upon. His undertaking is expressly to pay "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." Two things, therefore, must have concurred before the defendant became liable on this agreement; both that he should be of ability to pay, and that while of ability he should be requested to pay. The statute would not begin to run until both these facts concurred, which was not until 1838. *Buckler v. Moor* (a), where *Twisden J.* said, "If I promise to do a thing upon request, and the promise were made seven years ago, and the request yesterday, I cannot plead the statute," is still law. *Collins v. Benning* (b) is in conformity with this: there "in an indebitatus assumpsit the plaintiff declared on a promise to pay on demand; and non assumpsit *infra sex annos* pleaded; to which the plaintiff demurred; because declaring on a promise on demand he thought nothing was due till demand; and he should have pleaded non assumpsit *infra sex annos* after demand, or that no demand was within six years. *Per Curiam*. If the promise were for a collateral thing, which would create no debt till demand, it might be so; but here it is an indebitatus assumpsit, which shews a debt at the time of the promise, therefore the plea is good." See also *Vin. Abr. Limitation* (P) pl. 14 and note, *Bill v. Lake* (c), *Shutford and Borough's case* (d), *Webb v. Martin* (e), *Boyton v. Andrews* (f). The promise here is executory, like the promise to pay a bill of exchange so many months after demand or sight, in which cases it has been held that the Statute of Limitations does not begin to

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(a) 1 Mod. 89.

(b) 12 Mod. 444.

(c) Hetley, 138.

(d) Godb. 437.

(e) 1 Lev. 48.

(f) Cro. Eliz. 136.

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run until the specified period after demand or sight has elapsed: *Thorpe v. Booth* (a), *Thorpe v. Coombe* (b), *Holmes v. Kerrison* (c), *Dixon v. Nuttal* (d).

The promise of the defendant, being conditional to pay when able, made it necessary for the plaintiff in suing the defendant to prove his ability: *Davies v. Smith* (e), *Tanner v. Smart* (f), *Edmunds v. Downes* (g). It might have been thought that this would be an unfair onus of proof to throw upon the plaintiff, and therefore, probably, it was that the words, "whenever I may be called upon," were introduced into the agreement, to relieve the plaintiff from the continual necessity, which was supposed to exist, of watching the defendant's ability. It is clear, however, though these words did prevent the statute from running against the plaintiff until after demand by him, that he never was, in truth, under the necessity of watching the defendant's ability, because the defendant's ability was a fact peculiarly within his own knowledge, and he could have had no benefit from the statute, until after he had given notice of his ability to the plaintiff. The defendant's own ability could not affect the plaintiff until after notice, according to the ordinary principles on which notice is necessary: *Harris v. Ferrand* (h), *Vin. Abr. Notice* (A. 2), pl. 12, *Vyse v. Wakefield* (i), *Holmes v. Twist* (k). It would be most unreasonable that the defendant should be allowed to answer a claim by setting up a fact within his own peculiar cognisance. The defendant might have received a gift of 10,000*l.* without any improvement in his circumstances becoming at all manifest. Can he be allowed to say in defence—"True, I am of ability to pay now, so also was I ten years ago, though you did not know it; you ought to have brought your action sooner, it is now barred by the Statute of Limi-

(a) R. & M. 388.

(b) 8 D. & R. 347.

(c) 2 Taunt. 323.

(d) 1 C., M. & R. 307.

(e) 4 Esp. 36.

(f) 6 B. & C. 609; 3 C. 9 D

& R. 549.

(g) 2 C. & M. 459.

(h) Hardres, 41, 42.

(i) 6 M. & W. 442.

(k) Hob. 51.

tations." It seems indeed, if importance may be attached to particular expressions in *Davies v. Smith* (a), that the plaintiff had only to shew "that the defendant was of sufficient ability to pay *when he was sued*." The true reading of the defendant's promise is, "I will *always* pay whenever I am able and you require me." The defendant's agreement, under the circumstances, to debar himself of the plea of the statute, operates as an estoppel, on the principles of the decision in *Pickard v. Sears* (b).

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Erle and *Wortley* contra. The Statute of Limitations "is an extremely beneficial law, on which, as it has been observed, the security of all men depends, and is therefore to be favoured (c);" and an agreement by a man to debar himself of the statute is contrary to public policy and void.

Again, the agreement was nought, for the plaintiff was not bound; he might have sued upon the bills immediately notwithstanding the agreement.

But, assuming the agreement to be valid, the cause of action upon it arose as soon as the defendant became of ability to pay. The Statute of Limitations, consequently, began to run at that moment, although the plaintiff had no notice of that ability, and made no demand of payment. The defendant's duty to pay had arisen before the agreement was made, for the bills were then overdue; and no request is necessary to be proved where the promise is to pay, on request, a direct debt; the action itself is a sufficient request (d). The defendant, indeed, by his agreement promised to do less than the law already imposed upon him before he made the agreement. He was previously bound to pay immediately and unconditionally, and by his agreement he merely promised to pay when he should be able. *Christie v. Fonsic* (e) shews that, with respect to promissory notes payable on demand, the statute

(a) 4 Esp. 36.

(b) 6 A. & E. 469; S. C. 2 N. & P. 488.

(c) 2 Wms. Saund. 64, n.

(d) 1 Wms. Saund. 33 a, n. (2).

(e) 1 Selw. N. P. 352, (10th ed.)

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runs from their date, and *Norton v. Ellam* (a) establishes the same point as to notes payable on demand "with lawful interest." The word "demand," therefore, being nothing in such cases, as soon as the ability of the defendant in this case arose he was bound to pay immediately. Even if demand of payment was necessary to the plaintiff's right of action, he was bound to make it within a reasonable time after the defendant became of ability: *Holl v. Hadley* (b).

With regard to the want of notice of defendant's ability, it is sufficient to say, that the plaintiff did not stipulate for notice. The statute in this case runs from the fact of ability, just as in cases of tort it runs from the fact of the damage, without reference in either case to the time of the plaintiff's becoming acquainted with the fact.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—When indebted to the plaintiff's intestate on two overdue bills of exchange, the defendant signed a written promise to him in this form. (His lordship then read the agreement.) In an action brought on the two bills and on this agreement, the Statute of Limitations was pleaded successfully to the first two counts. On that plea to the third count several questions arise.

The issue was, whether the right of action accrued under that agreement within six years. This was in truth an issue in law, no fact being in dispute. It was strongly urged for the defendant that this promise to pay an actually existing debt created no liability, and that the introduction of a demand was no qualification of the promise. On the other hand, the plaintiff's learned counsel argued that the right did not accrue till demand was formally made. The former deduced from their position that the statute became a bar at the end of six years from the date of the agree-

(a) 2 M. & W. 461.

(b) 2 A. & E. 758; S. C. 4 N. & M. 515.

ment; the latter would suspend its operation till the time when the defendant became able to pay, or rather the time when the defendant gave plaintiff notice of such ability, and also till a demand was made.

On the first point we are clearly of opinion, that when plaintiff became of ability to pay, there was a complete right to bring an action, and the fact of bringing one was a sufficient demand. However a previous demand may be necessary to the right of action, where it is made by the agreement the period from which the time of the accruer of the right is to be reckoned, as *e. g.* a promise to pay two years after demand cannot take effect till the lapse of two years from the fact from which both parties agree to compute them, the reason does not apply where the promise is founded on a debt or duty, though subject to another condition.

It was clearly proved at the trial that the defendant became of ability in 1825; the demand was not made till very recently, but neither the intestate nor his administrator, the plaintiff, were shewn to have had notice of that ability till within six years before the action brought. Indeed, it was not even then a notice proceeding from the defendant, but knowledge accidentally obtained. We must, therefore, decide whether notice of ability is necessary, and whether when the fact exists, but is not known to the creditor, the right of action is kept alive against the operation of the statute.

This proposition, which is entirely new, is essential to the plaintiff's case. Of course there can be no authority in its favor, and we think that there is as little principle.

We have no power to introduce stipulations into contracts which the parties themselves have not made, unless it is perfectly clear that the benefit expressly agreed for cannot be obtained without some other act. In such case a promise to do that other act must be implied, and, in the present, if the knowledge of a party's becoming able to pay was of necessity locked up exclusively within his own

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bosom, the creditor could derive no benefit from such promise to pay, unless the ability were communicated to him, and a strong argument arises in favour of implying a promise to communicate. But the knowledge of an improvement in circumstances is by no means of necessity confined to the party. It will generally make itself known by some outward appearances, and the unpaid creditor will commonly find out the fact. If his evidence made but a slight *prima facie* case, a full answer might be reasonably expected by a jury from one to whom the state of his own finances must be well known. When a debtor, protected by the statute, promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action must prove the ability which revives his right. The period at which it is revived is that of the fact taking place, not that of his becoming acquainted with it. If this is right, we need not examine the numerous other points raised in argument.

On this ground it appears to us that defendant is entitled to have a nonsuit entered.

D.

Rule absolute.



Monday,
 January 24th.

CLAYTON, Bart. v. CORBY.

In trespass, to a plea justifying under a profit à prendre, pleaded under the stat. 2 & 3 Will. 4,

c. 71, to have been enjoyed thirty years "next before the commencement of the suit," the plaintiff replied, that a life estate existed during part, to wit, twenty-seven years of the thirty years in the plea mentioned. Rejoinder, that the life estate did not continue during any part of the said thirty years. Held, under this issue, that though the life estate did in fact exist during part of the thirty years next before the suit, that the defendant was entitled under the seventh section to exclude it altogether in the computation, and that he succeeded on the issue by shewing an enjoyment of twenty-five years, and five years, the former before and the latter after the life estate.

A plea of enjoyment of a profit à prendre for sixty years is defeated by shewing an unity of possession during part of the time. That may be shewn on a traverse of the plea.

Unity of title is a *prima facie* case of unity of possession (a).


(a) See R. acc. *Stott v. Stott*, 16 East, 351.

TRESPASS q. c. f. called Marlow Common, and digging up, turning up &c. the clay, earth &c. thereof, and taking and carrying away divers cart loads of clay &c. Pleas :—
 1. That before and at the said several times when &c. he

the defendant had been and was the occupier of a certain tenement and premises, to wit, a brick kiln, with the appurtenances, situate and being in the parish and county aforesaid, and that he the defendant, whilst he was such occupier as aforesaid, and all the occupiers for the time being of the said tenements, with the appurtenances, for the full period of sixty years next before the commencement of this suit, have respectively had and enjoyed as of right and without interruption, and he the defendant still as of right ought to have and enjoy a right to dig, take and carry away, in, out of, and from the said close in which &c. so much of the clay of the said close, in which &c. as was at any time required by him and them, his and their servants, for the purpose of making bricks in and at the said brick kiln in every year, and at all times of the year, and that he the defendant at the said several times when &c. (justifying under the right.)

2. That before and at the said several times when &c. he the defendant had been and was the occupier of a certain tenement and premises, to wit, a brick kiln, with the appurtenances, situate and being in the parish and county aforesaid, and that he the defendant, whilst he was such occupier as last aforesaid, and all the occupiers for the time being of the said last-mentioned tenement, with the appurtenances, for the full period of thirty years next before the commencement of this suit, have respectively had and enjoyed, as of right and without interruption, and he the defendant still as of right ought to have and enjoy a right to dig, take and carry away, in, out of and from the said close in which &c. so much of the clay &c. as was at any time required by him and them &c. for the purpose of making bricks in and at the said last-mentioned brick kiln, in every year and at all times of the year, and that he the defendant at the said several times when &c. (justifying as before.)

Replication to first plea, that for the full period of sixty years next before the commencement of this suit, the defendant and the said occupiers for the time being &c. with the appurtenances, or any or either of them, did not have or enjoy, as of right and without interruption, a right to dig, take

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and carry away, in, out of, or from the said close, in which &c. so much of the clay of the said close in which &c. as was at any time required by him or them, his or their servants, for the purpose of making bricks in and at the said brick kiln, in every year and at all times of the year, in manner and form as the defendant hath in the said first plea alleged.


Replication to second plea, that before and at the time of the making of the indenture hereafter mentioned, one *William Clayton*, Esq. and who afterwards, to wit, on the 10th day of May, A. D. 1799, became and was duly made and constituted a baronet, and from thence until his death as hereafter mentioned was called or known by the title or name of or dignity of *Sir William Clayton*, Baronet, was seised in his demesne as of fee of and in the said close in which &c.; and being so seised, afterwards and before the commencement of the said thirty years in the said last plea mentioned, and before the commencement of the having or enjoying of the said supposed right in that plea also mentioned, to wit, on the 15th day of July, A. D. 1785, by a certain indenture then made between the said *William Clayton* of the first part, *Sir William East* of the second part, *Mary East* of the third part, *Arthur Annesley* of the fourth part, *Richard Aldworth Neville* and *Francis Milman* and *Augustus Henry East* of the fifth part, which said indenture, sealed with the seal of the said *William Clayton*, the plaintiff now brings into Court, after reciting, amongst other things, that a marriage was intended to be solemnized between the said *William Clayton* and *Mary East*, the said *William Clayton* did grant, bargain, sell, release, and confirm unto the said *R. A. Neville* and *Arthur Annesley*, in their actual possession then being by virtue of a bargain and sale to them thereof made by the said *William Clayton* for 5s. consideration, by indenture bearing date the day next before the day of the date of the said indenture for one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession, and to their heirs, amongst other things, the said

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close, in which &c. in the said declaration mentioned, to have and to hold the said close, in which &c. with its rights, members and appurtenances unto the said *R. A. Neville* and *Arthur Annesley* and their heirs, to the use of the said *W. Clayton* and his heirs, until the said intended marriage should be solemnized, and from and after the solemnization thereof, to the uses, upon the trusts, and for the intents and purposes, and under and subject to the powers, provisoes, limitations, declarations and agreements thereafter limited, declared or expressed and contained, of and concerning the same, that is to say, to the use of the said *W. Clayton* and his assigns during his life, without impeachment of or for any manner of waste, and from and after the determination of that estate by forfeiture or otherwise in the lifetime of the said *W. Clayton*, to the use of the said *R. A. Neville* and *Arthur Annesley* and their heirs, during the life of the said *W. Clayton*, upon trust to preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require, but nevertheless to permit and suffer the said *W. Clayton* and his assigns to have, receive, and take the rents, issues and profits thereof, to and for his and their own use and benefit during his life, and from and after his decease, then as to, for and concerning the said close, in which &c. from and after the decease of the said *W. Clayton*, to the use of the first and every other son of the said *W. Clayton* by the said *Mary East*, severally and successively, and the heirs of the respective bodies of such sons, every elder of such sons and the heirs of his body issuing being always to take before and be preferred to the younger of such sons and the heirs of his body issuing, and in default of such issue, then as to the said close, in which &c. to the use of the said *W. Clayton*, his heirs and assigns for ever, as by the said indenture will more fully appear.

That afterwards and before the commencement of the said thirty years in the said last plea mentioned, and before

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the commencement of the having or enjoying of the said supposed right therein also mentioned, to wit, on the 16th day of July, A. D. 1785, the said intended marriage was solemnized between the said *W. Clayton* and *Mary East*, and afterwards, to wit, on the 1st day of October, A. D. 1786, the plaintiff was born the first son of the said *W. Clayton* and *Mary*, lawfully begotten by the said *W. Clayton* on the body of the said *Mary*.

That the said *Mary* afterwards, to wit, on the 9th day of August, A. D. 1833, died, and that the said *W. Clayton* continued alive, and the said life estate so created and vested in him as aforesaid continued for and during divers, to wit, twenty-seven of the said thirty years in the said last-mentioned plea mentioned, and afterwards and during the said thirty years the said *W. Clayton*, then called Sir *Wm. Clayton*, Bart., to wit, on the 2d day of February, A. D. 1834, died, leaving the plaintiff his eldest son and heir him surviving, who thereupon then became and was and still is seised in his demesne as of fee of and in the said close, in which &c.

That the having and enjoying of the said supposed right in the said last plea mentioned was for and during the whole of the life of the said *W. Clayton*, and for and during all the time in that behalf in the said last plea mentioned, without the knowledge or consent and against the will of the plaintiff.

Rejoinder to replication to second plea, "That the said life estate in replication alleged to have been created did not continue for and during any or any part of the said thirty years in said last plea mentioned, in manner and form as the plaintiff has therein in that behalf alleged."

At the trial before *Alderson B.* at the spring assizes, 1840, for the county of Bucks, it appeared in evidence with regard to the issue raised by the second plea, on the existence of the life estate during the period of thirty years next before the commencement of the suit, that that life estate began in 1785 and continued until 1834, but the defendant proved

the enjoyment in fact of the right claimed in the plea twenty-five years before the life estate, during the continuance of it, and from its cessation to the commencement of the suit. The contest then was, whether the life estate, existing as it did in point of fact during twenty-five years of the thirty years preceding the action, in point of law must be taken to have been within the period mentioned in the plea, or whether, in computing that period, the life estate was to be altogether excluded, as though it and the period of time covered by it had never existed.

With regard to the issue, raised on the first plea, as to an enjoyment of sixty years, it appeared that during a great part of that period there had been a unity of title in the lord of the manor of the servient tenement and of the brick kiln in respect of which the right was claimed. It was not proved affirmatively that in point of fact there had ever been any unity of possession in him. It was objected, on this issue, that this proof was inadmissible, or that if admissible it was not sufficient, as there might have been an unity of title without an unity of possession; both, it was contended, being necessary to prevent the effect of the enjoyment by the tenant of the dominant tenement. The jury found also, in answer to a question submitted to them by the judge, that the enjoyment proved had not been as of right. The learned judge directed a verdict for the plaintiff.

Biggs Andrews obtained a rule to shew cause why the verdict should not be entered for the defendant, or a new trial had.

Kelly and *Byles* shewed cause (a). As to the issue joined on the second plea, the plaintiff is entitled to retain his verdict. It would be a strange mode of construing the statute, to say that "next before" means thirty years ago. The defendant contends for a right to tack two periods

(a) At the sittings after Trinity term C. J., *Patteson, Williams* and term (June 15th), before Lord Den- *Coleridge* Js.

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together, one before and one after the life estate, but, if the defendant can do so at all, can he do so on this issue? Does the seventh section apply to the time before mentioned in the statute, as it were destroying and obliterating the period of disability, or does it apply only to the evidence, supposing the question to be raised in the proper manner? Sect. 5 relates to the pleadings. It shews an intention that all such questions should be raised on the record. It requires the replication to a plea of user, under the statute, to state specially any disability or other matter "not inconsistent with the simple fact of enjoyment." The rejoinder ought to confess and avoid, or traverse. If defendant intends to deny the existence of any disability during the period, in fact immediately before the commencement of the suit, he should traverse; if he intends to rely, as here, on the period before the disability, he should specially plead, affirming the new matter, viz. the enjoyment before the life estate began. The pleading should be either in that form, or the plea itself should state the facts specially. It is said the defendant would be under a difficulty, that he would not know the precise circumstances of the title of the servient owner; but he may avoid that difficulty by pleading at common law, or by pleading an enjoyment of sixty years under the statute.

But in any mode of pleading, the period to be computed must be that, in fact, which is under the fourth section expressly required to be "next before some suit or action," and the construction contended for by the defendant cannot be put on the words of the statute or of the plea without doing them the most extreme violence. [The rest of the argument on this point as well as the opposing argument for the defendant is sufficiently recited in the judgment of the Court.]

On the other issue *Onley v. Gardiner* (a) was cited to shew that unity of possession was admissible on a traverse of the enjoyment, to shew that it was not of right; and *Clay*

(a) 4 M. & W. 496.

v. Shackeray (a) was cited to shew that it was as much admissible on a traverse of the longer period as of the shorter.

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Biggs Andrews and *Gunning* supported the rule.

Cur. adv. vult.

LORD DENMAN now delivered the judgment of the Court.—In this case there were two pleas; one stating the enjoyment of a right to dig clay for making bricks for sixty years, the other for thirty years.

To the first plea, the plaintiff replied denying the enjoyment. To the second, he replied, setting out that before the thirty years Sir *W. Clayton* was made tenant for life, and that he continued tenant for life during twenty-seven of the thirty years. The defendant rejoined, denying that the life estate continued during any part of the thirty years mentioned in the plea.

The principal question was upon the second plea, which we will therefore consider first. The plaintiff proved at the trial that the life estate began in 1785 and continued till 1834, but the defendant proved the enjoyment from the year 1761 till the commencement of the action in 1840, so that he shewed an enjoyment for twenty-five years before the life estate, and during its continuance, and six years after it, and up to the commencement of the action. The question is, whether this was sufficient, or whether the thirty years must be the actual thirty next before the commencement of the action.

By the language of the 4th sect. of 2 & 3 *Will.* 4, c. 71, it should seem that they must, for it enacts, “that each of the respective periods hereinafore mentioned shall be deemed and taken to be the period next before some suit or action;” but section 7 provides “that the time during which any person otherwise capable of resisting any claim shall be tenant for life, shall be excluded in the computation of the periods hereinbefore mentioned.”

(a) 2 M. & Rob. 244.

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The defendant contends that the two sections are to be read together, so that the period is to be thirty years next before the action, excluding, in the computation of those thirty years, any tenancy for life.

The plaintiff says, that, if there be a tenancy for life during any part of those thirty years, the time of that tenancy is to be excluded, and the thirty years cannot be computed at all.

We think that the defendant's construction is the true one, and that if the plaintiff chooses to reply, and set up a tenancy for life, he excludes the time of that tenancy, and drives the defendant to shew thirty years' enjoyment, either wholly before the tenancy for life, if it be still subsisting, or partly before and partly after, if it be ended, as in the present case. A writ of *capias ad satisfaciendum* must lie in the office, in order to fix the bail, the last four days before the return, exclusive of Sunday. If the plaintiff's construction of the words of this act be right, it would by a parity of reasoning be impossible to fix bail where a Sunday was one of the actual four days before the return of the writ; yet the universal practice is otherwise.

But it is said, what, if there had been an interruption for two years during the tenancy for life and within thirty years before the action, is the plaintiff to be deprived of the benefit of such interruption? The answer is, no. Although the tenant for life cannot, by acquiescence burthen the estate, he may by resistance free it, and, if the plaintiff chooses to avail himself of that resistance, he may traverse the enjoyment as of right for thirty years and shew the interruption. The defendant will not then be allowed to shew the tenancy for life in evidence, in order to avoid the effect of the interruption. The seventh section is for the benefit of the plaintiff, and unless he sets it up by his replication it cannot be brought under the notice of the Court and jury, as appears by the fifth section, which provides, "that, if the other party shall intend to rely on any incapacity or disability, the same shall be specially alleged and set forth, and shall not be received in evidence on any

general traverse or denial." The thirty years alleged in the plea will be the thirty years actually or constructively next before the commencement of the suit, according as the plaintiff shapes his replication. We think, therefore, that the second plea was proved.

With respect to the first plea, we are clearly of opinion that evidence of unity of possession was receivable under the traverse of that plea, because it went to shew that the enjoyment was not as of right. *Onley v. Gardiner* (a) is decisive upon this point. The question, however, still remains, whether the evidence shewed such unity of possession. We are satisfied that it did, for it appears that the kiln, in respect of which the right is claimed, has always, as far as the evidence extends, been the property of the lord of the manor, the owner of the locus in quo, and held by a tenant under him. It is said that the lord may have purchased the kiln with the right attached and the tenancy subsisting, and so never having been in actual occupation of the kiln the right may still subsist. But we think that such a state of things is not to be presumed; on the contrary, the presumption arising from the evidence is rather that the kiln is, and always has been, parcel of the demesnes of the manor. The jury found that the user for seventy-nine years was *not* as of right, and we think that finding supported by the evidence, which would of itself dispose of the plea of sixty years' enjoyment, put in issue by the replication. And the jury also found that the user for sixty years was not as of right, that question having been put to them in express terms by the learned judge, and we think that the evidence warranted that finding. But with respect to the plea of thirty years' enjoyment, no such issue is taken upon this record. The only issue arising out of that plea is, whether the tenancy for life continued during any part of the thirty years, and we have already said that we think that issue ought to have been found for the defendant. The consequence is, that the defendant must succeed upon that plea,

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(a) 4 M. & W. 496.

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although he fails upon the other, upon evidence which would equally have negatived the plea of thirty years if a proper issue had been taken. But this is the plaintiff's own fault for replying the life estate, instead of traversing the enjoyment *as of right* for thirty years.

A doubt arose whether leave was reserved to enter a verdict for the defendant on this point, but, assuming that such leave was reserved, we think that the case ought to go to a new trial, in order that either party may have the opportunity of raising the question upon the record, if he thinks it advisable to do so.

G.

Rule absolute for a new trial.

MARY GLYNNE JOHNSON *v.* ISAAC FAULKNER (*a*).

Replevin for
 stacks and
 trusses of hay,
 and stacks of
 oats.

Avowry,
 that a third
 person was
 seised of the
 premises in
 which &c.,
 and, being so
 seised, he, by

RÉPLEVIN. The declaration stated that the defendant, on the 5th October, 1840, in and upon certain messuages, called &c., and in and upon certain rick yards, fields, &c. thereunto belonging, took the goods of the plaintiff, to wit, 2 stacks of hay, part of 1 other stack of hay, and a certain other large quantity of hay, to wit, 20 tons weight of hay and 500 trusses of other hay, 20 tons weight of straw

(*a*) Decided at the sittings after term (Feb. 1).

indenture, granted to the defendant an annuity or rent-charge to be charged upon and issuing and taken from the premises, and that in case it should be in arrear, that it might be lawful for the defendant to enter upon the premises to distrain, in the same manner as the law directs in case of rent in arrear.

Held, on general demurrer to the avowry, that the grantee might, under 2 *Will.* 3, c. 5, and 4 *Geo.* 2, c. 28, and the power in the indenture, take the oats and hay in stacks or trusses, as a landlord, under a distress for rent.

Held also, on objection that the defendant could not distrain upon the goods of a stranger, or of one in possession under a subsisting demise made previous to the grant of the rent charge, and that, for aught that appeared in the avowry, the goods distrained might be those of a stranger, or of a person claiming under a previous demise—1, that the goods of a stranger were distrainable for such a rent-charge under such a power; and 2, though the terms in the avowry, "seised of the premises," were not inconsistent with the existence of a subsisting lease, since the possession of the lessee would be that of the lessor, so that the lessor might be said to be "seised," notwithstanding the lease, yet that the objection could not avail, because, if the plaintiff did hold under a lease made prior to the rent-charge, he might and ought to have replied that fact.

and 500 trusses of other straw, and 1 stack of oats, and unjustly detained the same &c.

The avowry stated that one *Sarah Whitfield*, in 1802, "was *seised* of the said premises for the term of her natural life," and that in 1809 she married *Francis George Glynne Johnson*, whereby they became *seised* of the said premises in right of the said *Sarah*, and "being so *seised*," before the time when &c. to wit, on the 4th September, 1816, by indenture of that date, made between the said *Francis George Glynne Johnson* and *Sarah* his wife of the one part, and one *John Heptinstall* and one *Isaac Faulkner* the defendant of the other part (profert), gave, granted and confirmed unto the said *John Heptinstall* and *Isaac Faulkner* (the defendant), their executors, administrators and assigns, one annuity or clearly rent charge or annual sum of 300*l.*, to be yearly issuing and payable, and to be charged upon, had, received and taken from and out of the said premises in which &c. and divers other closes of land in the same county, in the said indenture mentioned, to have and to hold, receive, perceive, take and enjoy the said annuity or clear yearly sum of 300*l.*, unto them the said *John Heptinstall* and *Isaac Faulkner*, their executors and administrators, from thenceforth for and during the term of the joint lives of the said *F. G. G. Johnson* and *Sarah* his wife, and the said *F. G. G. Johnson* did, in and by the said indenture, for himself, his heirs, executors and administrators, further grant, covenant, promise and agree to and with the said *J. Heptinstall* and *I. Faulkner*, their executors and administrators, in case the said annuity of 300*l.*, or any part thereof, should happen to be behind or unpaid by the space of twenty days next over or after either of the said days or times whereon the same was appointed to be paid as aforesaid, that then and so often and from time to time as the same should happen, it should and might be lawful to and for the said *J. Heptinstall* and *I. Faulkner*, their executors or administrators, into and upon the said several hereditaments, out of which the same

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was made payable as aforesaid, or any of them, or any part thereof, to enter and distrain, and the distress and distresses then and there found to take, seize, lead, drive, carry away, impound, detain and keep, sell and dispose of the same, *in the same manner as the law directs in cases of rent in arrear*, until the said annuity and all arrears thereof, and all costs, charges and expenses which might be occasioned, sustained or incurred for or by reason or on account of the non-payment or undue payment thereof, should be fully paid and satisfied unto the said *J. Heptinstall* and *I. Faulkner*, their executors and administrators, as by the said indenture &c. will appear &c.; that after the making of the said indenture, and before the 4th of September, 1840, and the said time when &c., to wit, on the 29th of January, 1825, *J. Heptinstall* died. That afterwards and during the lives of the said *F. G. G. Johnson* and *Sarah* his wife, to wit, on the 4th of September, 1840, 150*l.* of the said annuity or yearly sum for the space of one half of a year, ending on the 4th September, 1840, became and was due and in arrear and unpaid, and so continued due and in arrear and unpaid for the space of twenty days next over and after the day and year last aforesaid, and from thence and until and at the said time when &c., the said *F. G. G. Johnson* and *Sarah* his wife, at the said time when &c., being alive, wherefore the defendant in his own right well avows the taking &c. to satisfy the said arrears of the said annuity, yearly rent or sum. Verification &c.

General demurrer and joinder.

The case was argued in Michaelmas term last (*a*) by

R. V. Richards for the plaintiff, and *Martin* for the defendant.

The argument is fully stated in the judgment.

Cur. adv. vult.

(*a*) Nov. 19th, before Lord Denman C. J., Williams, Coleridge and Wightman Js.

Lord DENMAN C. J. now delivered the judgment of the Court.—His lordship, after reciting the pleadings, proceeded thus:—Upon the argument, the objection mainly relied upon by the plaintiff was, that hay, corn, and straw, in stacks or trusses, could not be distrained at common law, and that the grantee of a rent-charge is not entitled to the benefit of the statutes which were passed for the assistance of landlords properly so called.

We are, however, of opinion, that the grantee of a rent-charge might, under such a power as that contained in the deed, justify the taking corn, &c. in a stack or in trusses as a landlord under a distress for rent. At common law, when distresses were mere pledges, which the distrainer was bound to re-deliver back upon satisfaction, nothing could be distrained for rent but such things as might be delivered back in the same plight as when distrained, and therefore corn and hay in sheaves and stacks were considered not distrainable, as they could not be re-delivered in the same condition they were in when taken, though hay or corn in a cart might be distrained with the cart in which they were, as they might then be re-delivered in the same condition. But, as this strictness rendered the remedy by distress in many cases inefficient, the statute 2 Will. 3, sess. 1, c. 5, s. 3, enables *any person* having rent in arrear and due upon any contract to distrain sheaves or cocks of corn or hay upon any stack or rick *or otherwise*, upon any part of the ground charged with the rent, and to detain the same in the place where it shall be found as a distress. If this were a case between landlord and tenant properly so called, there could be no doubt but that the distress of corn, &c, in stacks and sheaves would be good.

But it was contended that this statute did not extend to distresses for such rents as that in question, but only to distresses for rent service properly so called, and the case of *Miller v. Green* (a) was cited as an authority in favour of the plaintiff. In that case *growing crops* had been dis-

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(a) 2 C. & J. 142.

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trained for arrears of an annuity granted by a deed containing a power "to distrain for arrears of the annuity, and to dispose of the distress in all respects as distresses for rents reserved on leases for years might be disposed of." And it was held, that, though the powers given by the 2 Will. 3, c. 5, would extend to such a case, the grantee of the annuities could not avail himself of the subsequent statute of 11 Geo. 2, c. 19, introducing a new *subject* of distress (the growing crops). Without at all impugning the authority of that case, it is sufficient to observe that it does not apply to the present. In that case the party making cognisance relied upon the 11 Geo. 2, c. 19, which is in terms limited to "lessors or landlords;" in the present, the defendant claims the benefit of the 2 Will. 3, c. 5, which is more general.

If there were any doubt upon this point, it would be removed by the 4 Geo. 2, c. 28, s. 5, which gives the same powers of distress in cases of rent seck as in cases of rents under leases, and would therefore entitle the distrainor for such a rent as that in question to all the powers given by the *precedent* statute of 2 Will. 3, c. 5, even if not those given by the *subsequent* statute of 11 Geo. 2, c. 19.

But it was said that, however this might be, the distrainor could not exercise the power of distress for such a rent, in the manner stated in the avowry, upon the goods of a stranger, or of one in possession under a subsisting demise, *made previous to the grant of the rent-charge*, and that, for aught that appeared in the avowry, the goods distrained might be those of a stranger, or of a person claiming under a previous demise. The case of *Saffery v. Elgood* (a) is decisive as to the goods of a stranger being distrainable for such a rent and under such a power; and it was contended by the counsel for the defendant that the averment in the avowry, that the grantor of the rent-charge was *seised* of the premises at the time of the grant, was inconsistent with the existence of a subsisting lease for years, or from

(a) 1 A. & E. 191; S. C. 3 N. & M. 346.

year to year, and that, if there had been such a lease, the seisin might have been traversed, and that it must therefore be taken upon the pleadings that there was no subsisting demise at all; and that, if there had been, the defendant would not have stated a seisin of the premises, but a seisin *of the reversion of the premises expectant* upon the determination of the demise.

It is, however, quite clear that the allegation of seisin, so far from being inconsistent with a demise for years, may be supported by proof of it, the possession of the lessee for years being the possession of the lessor; and, therefore, in the present case, the plaintiff *might*, for any thing that appears in the avowry, claim by demise anterior to the rent-charge (*Com. Dig. Seisin, A. 2, and Assise, B. 4*). But, if the plaintiff did in fact hold under a demise made prior to the rent-charge, he might and ought to have replied that fact. Upon this point the case of *Howell v. Bell* (*a*) is express, and it was so considered in *Saffery v. Elgood* (*b*).

Upon the whole, therefore, we are of opinion that there should be judgment for the avowry.

D.

Judgment for defendant.

(*a*) 3 Salk. 136; S. C. 1 Ld. Raym. 172.

(*b*) 1 A. & E. 191; S. C. 3 N. & M. 346.

SMITH v. GOLDSWORTHY.

KELLY had obtained a rule to shew cause why fifteen pleas should not be added in this case to thirty-eight already pleaded, upon an affidavit, stating the application to the judge at chambers for leave to plead certain pleas, including the thirty-eight and the fifteen, the refusal of the application as to the fifteen, and the allowance of the thirty-eight.

several matters, or the judge's order upon which that rule was drawn up.

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Thursday,
January 27th.

A rule to shew cause why pleas should not be added to those already pleaded, need not be drawn up on reading the rule to plead.

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Sir *W. W. Follett* S. G. and *Butt*, who shewed cause (a), objected that the rule to plead several matters, or, at least, the judge's order, ought to be before the Court, as being the best evidence of what took place at chambers, and because this motion was in effect an appeal against the judge's decision there. They cited *South-Eastern Railway Company v. Sprott (b)*, where it was held that a motion to strike out pleas should be in form to rescind the judge's order allowing them to be pleaded, and the case was allowed to go on, merely because the course adopted by the plaintiff was in accordance with the pre-existing usage.

Kelly and *J. W. Smith* in support of the rule. The judge's decision is not questioned by this motion. On the contrary, the defendant relies on it as his only authority for pleading the matters already pleaded. So far from being the best evidence of what has taken place at chambers, the rule to plead several matters would not shew that any application had been made for any pleas except the pleas allowed. *South-Eastern Railway Company v. Sprott (b)* is in favour of the defendant, for it shews that, even where the rule was to rescind the judge's decision by striking out the pleas he had allowed, the Court thought that they had power to permit the case to proceed, on the ground that the course there pursued by the plaintiff accorded with the pre-existing practice. *A fortiori* the present case ought to be allowed to go on, since it cannot be denied that the course adopted by the defendant here is in accordance with that which is admitted in that case to have been the practice in all cases, and which, in such cases as the present, remains unaltered. [Lord *Denman* C. J. said that, this being a question of general practice, they would communicate with the judges of the other Courts before proceeding in the rule.]

Lord DENMAN C. J., on the following day, stated that

- (a) Before Lord *Denman* C. J., *Patteson*, *Coleridge* and *Wightman* Js.
 (b) 3 P. & D. 110.

the other judges were of opinion that the objection was not well founded, and that this Court also was of opinion that the discussion of the rule should be allowed to proceed.

It was agreed, however, with the permission of the Court, to refer the matter to *Wightman J.*, who consented to dispose of it at chambers (a).

(a) There were similar rules in other actions pending in the Courts of Common Pleas and Exchequer, but the parties all acquiescing in Mr. Justice *Wightman's* decision at

chambers, rules were drawn up by consent, for the allowance of the pleas ultimately added under his order.

D.

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CONTANT and others v. CHAPMAN.

Monday,
January 24th.

CASE against the marshal of the Marshalsea, for an escape of a prisoner in custody on mesne process.

A debtor arrested in the country on mesne process brought himself by habeas corpus before a judge in town, by whom he was committed to the custody of the marshal of the Marshalsea. Shortly afterwards he filed his petition to the Insolvent Court for his discharge,

The first count of the declaration stated, that on the 23d of April, 1836, the sheriff of Hants had arrested one *Darnoux* for debt, on a *capias ad respondendum*, at the suit of the plaintiffs; that on the 4th of May, 1836, *Darnoux* was brought by habeas corpus before Lord Denman C. J., and by his lordship committed to the custody of the defendant, at the suit of the plaintiffs; that the defendant accordingly received and detained *Darnoux* in custody until the 2d of March, 1837, when the defendant voluntarily permitted him to escape &c.

under 7 Geo. 4, c. 57, and that Court ordered that he should be discharged as to the creditor's debt, as soon as he should have been in custody fifteen months. On this he returned to the marshal's custody, and while there was brought by a habeas corpus cum causa before the Central Criminal Court, to plead to an indictment for perjury. He pleaded not guilty, and traversed to the next sessions, but, as he could not give bail as required, that Court committed him to Newgate, until discharged by due course of law. Subsequently he was bailed, whereupon the keeper of Newgate, without any fresh warrant, carried him back to the Marshalsea, where he was received by the marshal. After this, and before the expiration of the fifteen months, he escaped. In case against the marshal for the escape,

Held, that the defendant's charge ceased when he brought the prisoner before the Central Criminal Court, and that, as it had not been revived by any fresh warrant of commitment, the custody of the prisoner at the time of the escape was illegal. That the defendant therefore was not liable, and that his conduct in receiving the prisoner did not estop the defendant from saying that he had no right to detain him.

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The second count stated an arrest on mesne process by the sheriff of Hants, and his commitment to the Marshalsea on being brought up by habeas corpus, as in the first count, and then stated that on the 12th of May, 1836, *Darnour*, while in custody of the defendant, filed his petition for his discharge, under the 7 Geo. 4 and other the Insolvent Acts, and that such proceedings were thereupon had, that on the 2d of July, 1836, it was ordered by the Insolvent Court that *Darnour* should be discharged out of custody, when he should have been in custody for a period not exceeding fifteen calendar months from the date of filing his petition, for fraudulently concealing part of his property, and that he should be confined within the walls of the prison, and not within any rules or liberties thereof; whereupon the defendant, as such marshal, declared *Darnour* in his custody, upon and by virtue of the said last-mentioned commitment and the said order of the Insolvent Court, and that the defendant was then permitted by the defendant to escape, as in the first count mentioned.

Pleas: 1. Not guilty.

2. To the first count, (after setting out the order of the Insolvent Court and the earlier proceedings with respect to *Darnour*, as mentioned in the declaration,) that whilst *Darnour* remained in the defendant's custody as last aforesaid, to wit, on the 13th of June, 1836, a writ of habeas corpus cum causâ issued out of the King's Bench, commanding defendant to have the body of *Darnour*, together with the day and cause &c. before his majesty's justices of the Central Criminal Court, on the 8th of July then next, at Justice Hall, in the Old Bailey, then and there to plead to an indictment against him, *Darnour*, for perjury, and to be further dealt with according to law. That on the day last aforesaid, in obedience to the writ, defendant had the body of *Darnour*, together with the day and cause &c. before his majesty's justices of the Central Criminal Court, at Justice Hall, in the Old Bailey, according to the exigency of the writ. And *Darnour* having pleaded not guilty to

such indictment, and having traversed the same to the next sessions of the Central Criminal Court, was thereupon by the said justices committed to Newgate, until discharged by due course of law. By virtue of which last-mentioned commitment, one *W. W. Cope*, being then and continually from thenceforth hitherto the keeper of Newgate, then received *Darnoux* in his custody in Newgate, for the cause last aforesaid, there to remain until discharged by due course of law. That *Darnoux* hath not at any time hitherto been recommitted to the custody of him the defendant, absque hoc that *Darnoux* was at the said time when &c., in the first count mentioned, in the custody of the defendant for the causes in the first count mentioned, modo et formâ. Conclusion to the country.

The 3d plea, which was to the second count, did not differ materially from the preceding plea.

Issue was joined on the above pleas.

The cause was tried before Lord *Denman* C. J., at the Middlesex sittings after Michaelmas term, 1840. It appeared that, on the 25th of April, 1836, *Darnoux* was arrested in Hampshire for debt, on a *capias ad respondendum*, at the suit of the plaintiffs; that on the 4th of May he removed himself by *habeas corpus* before Lord *Denman* C. J., and was committed by his lordship to the Marshalsea. Several other actions were then commenced against him at the suit of other creditors, and detainers lodged therein.

On the 12th of May, 1836, *Darnoux* filed his petition to the Insolvent Court for his discharge, under 7 Geo. 4, c. 57, and on the hearing, on the 2d of July, that Court, on the ground that he had fraudulently concealed part of his property, ordered his discharge, and that he should be entitled to the benefit of the act, as soon as he should have been in custody fifteen months, from the date of filing his petition, which fifteen months were to be passed within the walls of the prison. The Court also issued at the same time its warrant, not a warrant of commitment, but for *Darnoux's* discharge, at the end of the fifteen months.

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Upon this he returned to the defendant's custody, and whilst he was there he was indicted at the Central Criminal Court, on the prosecution of the plaintiffs, for perjury, and on the 8th of July, 1836, he was brought up by a writ of habeas corpus cum causâ before the Central Criminal Court, "to plead to the indictment, and to be further dealt with according to law." He pleaded not guilty, and traversed to the next sessions. He was then ordered to enter into recognizances and to find sureties, and was, by order of the Central Criminal Court, "for want of sureties, committed to and ordered to remain in his majesty's gaol of Newgate, until discharged by due course of law." On the following day he entered into the recognizances and found the sureties required, whereupon the keeper of Newgate, without any fresh warrant, carried him back to the Marshalsea. One of the defendant's officers observed on this absence of a fresh warrant, as an irregularity, but *Darnoux* was notwithstanding received back into the custody of the defendant. Upon payment by the plaintiff of certain fees to the defendant's officer, on the occasion of bringing *Darnoux* up by the habeas corpus to the Central Criminal Court, a sum was included which the officer stated would be returned if *Darnoux* was not remitted back to the Marshalsea, but the sum was not returned. The escape took place in the beginning of March, 1837.

Under the direction of his lordship, the jury found a verdict for the plaintiffs, subject to a motion to enter the verdict on the second and third issues, if the Court should be of opinion that the defendant was not liable, as the prisoner had been lawfully taken out of the defendant's custody, when he was brought before the Central Criminal Court, and, there being no fresh commitment, had never lawfully been remitted to the defendant's custody.

In Hilary term, 1841, Sir *J. Campbell* A. G. obtained a rule nisi accordingly.

Sir *W. W. Follett* S. G., *Hoggins* and *Griffin* shewed

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cause (a). The defendant is liable because—1. At the time of escape the prisoner was regularly in the defendant's custody. By the Habeas Corpus Act, 31 *Car. 2*, c. 2, s. 8, it is enacted, that "nothing in that act shall be taken to extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause; but that after he shall be discharged of his imprisonment for such his criminal offence, he shall be kept in custody, according to the law, for such other suit." Kept in what custody? Obviously in the custody in which he was before he was brought up by habeas corpus. What necessity could there be for a fresh commitment to the Marshalsea, after the prisoner had been discharged by the Central Criminal Court? The custody in the Marshalsea was intermitted for the sole purpose of having the prisoner in the criminal court to answer a particular charge, and, after that purpose had been satisfied, the right of the marshal to resume the custody of the prisoner revived of itself. In the 9th direction in the "Directions for Justices of the Peace (b)," it is directed, "that, if any habeas corpus come to receive a prisoner from another gaol, the gaoler to take notice of the offence for which he stood committed at the other gaol, and to inform the Court, that, if he shall happen to be acquitted or have his clergy, he may yet be remanded to the former gaol, if there be cause."

2. As against the plaintiff, who, as creditor, was no party to the change of custody, the marshal, having chosen to receive back the prisoner into his custody, is estopped from saying that he had no right so to receive the prisoner in custody. He did receive the prisoner, and was bound to detain him. "*J. S.* being in execution in the Fleet, was suffered to make a voluntary escape, after which he returned again to the Fleet, and the defendant being made warden in the place of the former warden, *J. S.* was turned over

(a) At the sittings after last M. T. (Nov. 27), before Lord Denman C. J., *Williams, Coleridge* and *Wightman* Js.
 (b) *J. Kelyng*, 4.

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with the other prisoners, and afterwards suffered to escape; and the question was, whether the voluntary escape suffered by the former warden did not so entirely discharge the execution, that the prisoner could not be retaken, nor judged in execution, by law, even though he should yield himself to it. And it was held that it did not, and that the preceding warden would be chargeable with the escape suffered in his time:" 3 *Bac. Abr. Escape*, (E 1), citing *Lenthal v. Lenthal* (a), which was an action of debt for an escape. So in *Grant v. Southers* (b), which was an action for false imprisonment, it was held that the plaintiff, who had been suffered to escape by a former marshal of the King's Bench, might, on a voluntary surrender, be lawfully detained by the defendant, who was the succeeding marshal. "This act," says Lord Coke, in 2 *Inst.* 382, (16) of the statute of Westminster, "extends to all keepers of gaols, and therefore if one hath the keeping of a gaol by wrong, or de facto, and suffereth an escape, he is within this statute, as well as he that hath the keeping of it de jure."

Sir F. Pollock A. G. and Platt contra. At the time of the prisoner's escape, he was not in the authorised custody of the defendant. The sentence of the Insolvent Court under 7 *Geo.* 4, c. 57, s. 48, with respect to a fraudulent debtor, merely postpones his enlargement, it is in itself no commitment. When the sheriff of Middlesex had the prisoner in his custody, he had him cum causis civil as well as criminal; when the criminal causes of detention were over the civil remained, and the sheriff should have continued the detention for the civil causes, by taking the prisoner as a debtor to Whitecross Street Prison, as the place of civil custody. The marshal ceased to have any thing to do with the prisoner's custody as soon as he had brought the prisoner to the Central Criminal Court, and he could not regain the right of detaining the prisoner except through a recommitment or other suitable process. Suppose the prisoner had broken out of Newgate, could the marshal

(a) 2 *Lev.* 109.(b) 6 *Mod.* 183.

have retaken him by virtue of the prior commitment? The escape, in truth, took place before the prisoner was delivered to the marshal and in the course of such delivery, for there was nothing to authorise the change of custody: *Westby's case* (a). The cases cited do not apply; in those cases the prisoner had escaped from the custody of the marshal, and it was the duty of the marshal then, as it appears to be now, from the order of this Court (b), made on the appointment of the present marshal, to retake all prisoners who had not been lawfully discharged from the custody of his predecessor. Here the prisoner was lawfully taken out of the defendant's custody, and was not lawfully restored to it.

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Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court as follows :—This was an action for an escape from the custody of the marshal, and the point raised by the special plea to each of two counts was, whether one *Darnoux*, at the time of the escape, was in the custody of the defendant for the cause in the declaration stated, which was a debt alleged to be due from him to the plaintiffs. The defence at the trial was, that he was not in defendant's legal custody at all, and of course therefore not for the cause above mentioned. [His lordship then stated the facts of the case.]

The question is, what was the character of that custody from which *Darnoux* departed? Unless it was legal in itself, or as against the defendant by a sort of estoppel growing out of his own conduct, it could not be a custody for the cause stated in the declaration, not a custody the departure from which by the permission of the defendant could give the plaintiff a cause of action against him. And it appears to us clearly not to have been in itself a legal custody. The defendant's authority to detain *Darnoux* in the first instance arose from the commitment consequent upon the first *habeas corpus*, and on this the order and warrant of the Insol-

(a) 3 Rep. 71 b, 1st Resolution.

(b) 1 A. & E. 377.

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vent Debtors' Court had no effect. That court merely remanded, and gave the defendant a prospective warrant for the prisoner's discharge, which in consequence of the escape has never taken effect. One clear proof of this is, that if, immediately after the order, the detaining creditors had agreed the defendant might have released *Darnoux* without any contempt of the court, indeed would have been bound to do so; the only consequence would have been that *Darnoux* would have lost the benefit of the act in the legal discharge from the debts in his schedule.

But, when in obedience to the second habeas corpus the defendant had brought *Darnoux* from the Central Criminal Court and, that court not remanding him, had taken him out of the defendant's custody and committed him to Newgate, the defendant's charge of him entirely ceased; he had no more to do with him at that moment than the sheriff of Hants, who had originally arrested him, and from whom he had received him. What would become of *Darnoux* was quite uncertain; he might never find bail—he might on his trial have been convicted, and imprisoned for more than the fifteen months, or have been sentenced to transportation, he might have escaped from Newgate,—on all or any of these suppositions the defendant could have been liable for no escape. How then has the defendant's legal custody of *Darnoux* been revived? Without any warrant or authority the gaoler of Newgate has brought the prisoner back to the defendant's prison, and he has received him; the gaoler of Newgate, however, having no authority to bring him could confer on the defendant no legal right to detain him. And the effect of the original commitment was determined by the authority of the Central Criminal Court.

It could scarcely be contended that during the imprisonment in Newgate the prisoner remained in any sense under the care of the defendant, so as that he was still charged with the cause. This could not be contended, without holding that the defendant would have been civilly responsible for an escape from Newgate, but the habeas corpus puts this out of question, because it removed the pri-

soner *with the cause*, and the sheriffs of London became, upon this commitment to their prison, for the time at least, charged with the cause, and then the defect in the plaintiffs' case is the want of any legal determination of that charge, and replacing it with the defendant.

It was argued however that, as between these parties, the strict legality of the custody was not material, and a passage from Lord Coke's Commentary on the Statute of Westminster the 2d, c. 11 (a), was cited, "that this statute extended to all keepers of gaols, and, therefore, if one hath the keeping of a gaol by wrong or de facto and suffereth an escape he is within the statute, as well as he that hath the keeping of it de jure." But this statute and the commentary both suppose a committal by proper authority, and Lord Coke only asserts that in such a case the wrongful officer shall not protect himself, from answering to the lord in damages for the escape of his defaulting accomptant, by his own wrongful usurpation. This is but just, the law must have the party committed to the lawful gaol within the county, and ought not to suffer by the fact that there is a usurping gaoler; but this has no bearing on the present case. In *Bacon's Abr. (Escape)*, in *Civil Cases* escape is defined to be "in general where any person who being under *lawful* arrest and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law;" and under the letter A are collected several cases to shew what is meant by lawful arrest, from which it appears that the distinction is between process voidable, and erroneous but unreversed, which the gaoler is bound to respect, and is therefore protected by, and process void or no process; and this seems highly reasonable. Upon this distinction the case of *Shirley v. Wright (b)* entirely proceeded; but the case of *Bourne v. Cooling (c)* is very material to this point; that was escape, against the marshal, of a prisoner

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(a) 2 Inst. 382 (16).
 (b) 2 Ld. Raym. 775.

(c) 2 Show. 17, pl. 10.

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turned over from the Fleet; the declaration alleged that *virtute brevis de habeas corpus* directed to the warden he was *debito modo commissus* to the King's Bench, and the Court arrested the judgment, because "it does not appear *that he was committed*, for he cannot be committed by an *habeas corpus*." Here then there was a *habeas corpus* to bring the plaintiff up from the Fleet, and he must have been received by the marshal, yet the Court held that the want of a committal made his evasion no escape to charge the marshal. The case of *Boothman v. Earl of Surry* (a) seems to establish the same principle and prove something like the converse of this case; there the defendant, who was the chief bailiff of a liberty, and under a mandate from the sheriff had arrested a debtor, and had him in his custody in the gaol of his liberty, was held liable to an action for an escape for removing him out of the liberty into the custody of the sheriff, and placing him in the county gaol without the authority of any *habeas corpus* or other writ for his removal. *Ashurst J.* says, "the execution was complete by the defendant arresting the prisoner within his bailiwick; *if so, the prisoner could not be removed to the sheriff of the county without some legal warrant*. This is as much an escape in the defendant as if he had removed the prisoner into any other county." Yet here the removal was in fact in furtherance of and might seem to complete the execution of the *ca. sa.* to the sheriff; so jealous is the law of any interference with the liberty of the subject without lawful warrant. According to this case the sheriff, whose officer the keeper of Newgate is, was guilty of an escape in bringing *Darnoux* to the marshal, and if he had escaped already how could the marshal be also guilty of an escape? We conclude therefore that, unless the defendant be precluded by his own conduct from questioning the legality of the custody from which *Darnoux* escaped, this action cannot be maintained, and the course of argument used and the authorities cited have already nearly disposed of that latter point. The evidence here shews that the defendant

(a) 2 T. R. 5.

by his deputy was aware of the irregularity and yet received the prisoner. In every case, in which the gaoler contests the liability for an escape, the latter circumstance must have occurred, and it is hardly to be supposed that in any case he can be ignorant of the *fact* that there has been no warrant or other authority for his receiving the prisoner; the legal consequences of that fact it is not material whether he knows or not, as ignorance of them would not excuse him if sued by the prisoner for false imprisonment, knowledge of them ought not to prejudice him in an action for letting him go. The cases, indeed, cited before were cases in which the objection now urged arose on the record, and there was no room for any presumption of fact; here it will be said that it must be presumed against the defendant, and that he is precluded by his own act from contravening, that there was a sufficient authority for his detention of *Darnoux*. All the evidence in the cause shews that this would be a presumption against the fact; yet, if the plaintiffs had been prejudiced by the defendant's conduct, the rule on which we have frequently acted might have applied, but there is no ground for alleging this. If the defendant had no authority to receive, the keeper of Newgate had no authority to bring; the escape had already taken place, and, as it was clearly a voluntary one, the sheriff could not have retaken or detained *Darnoux*; and, if the defendant knew that he had no authority by law to receive, he must be taken, in fairness, to have known also these other concurring circumstance. He therefore knowingly receives an escaped prisoner, whom he knows also that he cannot lawfully detain. There is no evidence that the prisoner objected, the act of receiving therefore was not unlawful. But we think this did not bind the defendant as against the present plaintiffs even to do an unlawful act, which the detention against the will of the prisoner would have been, and thereby expose himself to an action for false imprisonment.

Upon the whole, therefore, we think the rule should be absolute.

D.

Rule absolute.

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THE QUEEN *v.* The Archbishop of YORK and Dr. JOSEPH
PHILLIMORE (*a*).

By 3 & 4 Vict.
c. 86, s. 23,
"no criminal
suit or pro-
ceeding,
against a clerk
for any offence
against the
laws ecclesias-
tical, shall be
instituted in
any ecclesias-
tical court
otherwise than
is hereinbefore
enacted."

By sect. 25,
"nothing in
this act con-
tained shall be
construed to
affect any
authority over
the clergy of
their respec-
tive provinces
or dioceses,
which the
archbishops or
bishops of
England and
Wales may
now according
to law exercise
personally and
without pro-
cess in court."

Where, after
the passing of
the act, an
archbishop, at
his visitation,
received a
charge of si-
mony against

a clerk, and pronounced sentence of deprivation against him, and interdicted him from exercising his functions on pain of the greater excommunication :

Held, that the proceeding ought to have been conducted in the mode directed by the statute, because it was a *criminal* proceeding and in *court*, within the words of sect. 23, and was not within the reservation of sect. 25, because the power of depriving "personally and without process in court" did not belong to the archbishop before the statute; and this Court prohibited the archbishop from enforcing the sentence.

SIR W. W. FOLLETT, in Easter term last (May the 8th), obtained a rule, calling upon the archbishop and Dr. *Phillimore*, his commissary, to shew cause why a writ of prohibition should not issue to prohibit them from proceeding further in the matter of certain charges of simony and simoniacal practices against *William Cockburn*, D.D., or from carrying into execution or otherwise giving effect to the sentence of deprivation, pronounced by the archbishop against Dr. *Cockburn*.

It appeared from the affidavits in the case, that, on the 8th of January, 1841, the archbishop issued his letter of citation to the dean and chapter of York cathedral, in the following form : "Whereas, in order to inquire into errors and correct irregularities, and to hear and determine matters in dispute, concerning which complaint has been made to us, we intend (God willing) to exercise our office of visitor over you the dean and chapter of the said church, therefore, by the tenor of these presents, we inhibit you, from the day of the receipt hereof (pending our visitation), from doing anything to the prejudice of our jurisdiction, under pain of the law and contempt thereof, and by the tenor of the same presents we peremptorily cite you the dean and chapter of the said church, and enjoin you to cite, or cause to be cited peremptorily, all and singular the brethren and canons of the said church, together with your registrar and those of your officers whose presence may be required in the business of our said visitation; that you and each of you appear before us or our commissaries or commissary, in the chapter house

(*a*) Decided in Trinity term last (June 19).

of the said cathedral church, on Monday, the 18th day of January, between the hours of &c., with continuation and prorogation of time and place (if need be), canonically to receive and humbly to submit to our intended metropolitical visitation examinations, due corrections and wholesome admonitions, and then and there respectively to exhibit (if required) your statutes, foundations, ordinances, privileges, collations, letters of orders, and other muniments whatever, relating to your dignities and prebends; and also to pay the procurations due on this our primary metropolitical visitation, and further to do and receive what the business and nature of such a visitation require; and we also enjoin you, on the above-mentioned day, hours and place, to produce a certificate to us, or our commissaries or commissary, by your letters patent, setting forth the day of your receipt of these presents, and all which you have done in pursuance thereof," &c. &c.

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The archbishop attended at the cathedral on the 18th of January, to hold his visitation accordingly, when *Dr. Cockburn*, the dean of York, and certain other members of the chapter appeared, and the archbishop ordered certain articles of inquiry to be delivered to the dean and canons of the cathedral, and appointed *Dr. Phillimore* his commissary to prosecute the visitation.

The articles, which were twenty in number, contained inquiries concerning the fabric lands of the church, the progress of its repair, the performance of divine service therein, the residence of the canons, and other similar matters. The nineteenth article of inquiry was, "Are the chancels of the churches and chapels belonging to the dean and chapter, and the other members of your body, in good and sufficient repair?"

The business of the visitation was continued on the three following days, and was then adjourned until the 25th of February.

On the 21st of February, the commissary, *Dr. Phillimore*, addressed the following letter to *Dr. Cockburn*, the dean; "It was only by yesterday's post that I received *Mr. Dixon's*

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answers to the articles of inquiry exhibited at the commencement of the visitation. The answer to the nineteenth article involves a charge against you, which has not been before brought to my notice, and which is of so serious a nature that I enclose a copy of it for your perusal, that you may be prepared with a reply to it, when we resume the business of the visitation on Thursday next." The answer inclosed of Mr. *Dixon*, who was one of the canons of the cathedral, to the nineteenth article, was as follows: "The churches belonging to the patronage or jurisdiction of the dean and chapter are many of them situated in other counties. The chancels of the appropriated vicarages are usually left, by the provision of the leases, to the charge of the lessees. The presentations to the vicarages in the dean's patronage are usually sold, but whether any portion of the purchase-money has been applied to repairs or other local purposes does not appear."

The business of the visitation court was proceeded with on the 25th of February. The dean did not attend. Mr. *Dixon* attended, and, being called upon to state the particulars of his charge against the dean, read them from a written paper. The court met again on the following day, and was then adjourned to the 23d of March, for the express purpose of inquiring into the truth of the charge against the dean, who was served, about the 20th of March, with a monition, requiring him generally to appear at the visitation on the 23d, but stating nothing relative to the charge against himself. On the 11th of March, however, the archbishop had sent a letter to the dean, desiring him to be present at the visitation on the 23d, to meet Mr. *Dixon's* charge, but the dean was never served with any citation or process from the court, requiring him to attend and answer the charge.

On the 23d of March, the visitation was continued by the commissary, when the dean and Mr. *Dixon* and other canons were present. The commissary then called on Mr. *Dixon* to proceed to sustain his presentment against the dean for simoniacal practices. Upon this the dean protested against the jurisdiction of the commissary. The commissary

decided to proceed with the inquiry. The dean frequently interrupted the proceedings, notwithstanding the admonitions of the commissary, and was eventually pronounced contumacious and in contempt. The dean then left the court, and did not attend it again during that or any other subsequent meeting. The commissary then proceeded on that and the two following days to hear *vivâ voce* evidence on oath in support of the charge, which was prosecuted by an advocate of the Consistory Court of York on behalf of *Mr. Dixon*. The Court was afterwards adjourned till the 1st of April. On that day a barrister appeared on behalf of the dean, to argue that he ought not to have been pronounced in contempt, but the commissary decided that the dean was in contempt, and must appear personally to purge his contempt, before counsel could be heard in his behalf. The visitation was resumed on the 2d of April, when the commissary delivered his judgment upon the charge of simony presented against the dean, and declared that it had been proved, and for that offence as well as for contumacy pronounced sentence of deprivation against him. He then adjourned the visitation to the cathedral, and the archbishop, to whom the evidence had been previously read over, being there present, and having been informed by the commissary of the grounds of the said judgment, delivered it to be read by the actuary, and after it had been read affixed his signature to it.

The judgment, after reciting the proceedings at the visitation, pronounced the dean guilty of simoniacal practices, which were set out, and also of contumacy and contempt, and then concluded thus :

“ Therefore we the said *Edward* Archbishop of York do pronounce, decree and adjudge, that the said very Reverend *William Cockburn*, dean of the said cathedral and metropolitical church of Saint Peter of York aforesaid, ought of right and by law to be deprived and deposed of and from all honour and dignity and his place of the cathedral church of Saint Peter of York aforesaid, with all and every of its rights and appurtenances, and of and from all decanal office, duty and

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administration, and from all and every ecclesiastical benefice within the province of York aforesaid, and by these presents we do monish and interdict him, that he shall not in or for the future wear, use or put on the habit and dress fit and proper for the decanal order, and such as is usual to be worn and put on by the deans of the said United Church of England and Ireland, and that he shall not presume to use any other decanal ensigns, under the pain of sentence of the greater excommunication to be inflicted upon him the said very reverend &c., and this and all and singular other the premises, we do pronounce, decree and declare, by this our definite sentence, or final decree, which on this visitatorial proceeding we do make, read, and promulgate, by these presents. In testimony whereof, we have caused our archiepiscopal seal to be affixed to these presents. Read and given in the chapter house of the cathedral and metropolitical church of Saint Peter of York, this 2nd day of April, 1841."

After this sentence the visitation was adjourned to the 14th of May.

The affidavits in support of the rule also stated, that a written statement of the particulars of Mr. *Dixon's* charges signed by him, and bearing date the 31st of March, was delivered to the deputy registrar of the archbishop on the 1st of April, and then filed; and that the answer of Mr. *Dixon* to the 19th article of the interrogatories was the foundation of the proceedings against Dr. *Cockburn*.

Dr. *Cockburn* made affidavits stating that no notice of any intention to issue any commission under the hand of the Archbishop of York, pursuant to the provisions of the 3 & 4 Vict. c. 86. s. 3, containing an intimation of the offence with which he was charged, together with the name, addition and residence of the party, on whose application such commission was about to issue, had been sent to the deponent; that all the proceedings at the visitation were held before the commissary, and not before the archbishop himself, with the assistance of three assessors, as required by the 11th section of the act; that the deponent had never been cited

to appear at the visitation in the matter of any charge of simony; that no libel or articles were ever delivered to the court of visitation, or, if delivered at all, were not delivered until after the witnesses had been examined, and that deponent had never been called upon to answer to any libel or articles on oath or otherwise, and that no day was assigned to him for his answer, or for his proofs and interrogatories.

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It appeared also that, before sentence, application had been made to the Lord Chancellor to prohibit the archbishop from proceeding with the inquiry, and that his lordship had dismissed the application, on the ground that the archbishop had a right to inquire into the conduct of his clergy, and that the Court could not suppose that he would proceed beyond inquiry.

The grounds on which the rule was obtained were, First, that generally the ordinary as visitor had no jurisdiction to deprive.

2. That, if this general authority did exist, it could not be exercised by the archbishop over the dean and chapter of York, because the peculiar constitution of the latter body, as appeared by a bull of Pope *Celestine* the Third, and by ancient compositions between the archbishop and the dean and chapter, exempted the latter from such visitatorial jurisdiction.

3. That, whatever might have been the case formerly, since the 3 & 4 *Vict.* c. 86, the proceedings on a charge of simony must be conducted as directed by that statute, and the proceedings now in question were void.

Cause was shewn in Trinity term last (a), by

Sir *J. Campbell* A. G., Sir *T. Wilde* S. G., *Dundas*, and Dr. *R. Phillimore* (b), and *J. Bayley*, and

Cresswell, Sir *W. W. Follett*, Dr. *Addams* (b) and *Cockburn* were heard in support of the rule.

Cur. adv. vult.

(a) June 7th, 9th, and 10th before Lord *Denman* C. J. *Patteson*,

Williams and *Coleridge* Js.

(b) By permission of the Court.

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Lord DENMAN C. J. at the sittings after the same term (June 19) pronounced the judgment of the Court as follows:—The proceedings in this case may be very shortly stated. His Grace the Archbishop of York, as ordinary, cited the dean and chapter of York to attend his visitation, and appointed a learned civilian, Dr. Phillimore, his commissary general “for correcting and punishing by ecclesiastical censures whosoever shall be contumacious, and for administering articles in writing to the said dean and chapter, and receiving their presentments and answers, and for doing every thing else appertaining to the nature and quality of our said visitation.” The ancient formula of the commission ran in the following style:—“Ad errata enormia corrigendum et extirpandum et virtutes et alia ad pietatem conducentia plantandum et ad Dei laudem instituendum et seminandum.” There seems no reason to doubt that here was sufficient authority to inquire into the ecclesiastical offences of every spiritual person belonging to the body visited. But at first the proceeding was confined to the fiscal concerns of the chapter, relating principally to the application of a fabric fund. The dean attended, and being examined respecting some share of this money, which he was said to have received, conducted himself during that proceeding in a manner that was deemed contumacious, and sentence of contempt was by the commissary pronounced against him. He then absented himself. The proceedings went forward, and in answer to an interrogatory respecting the actual state of repair of several churches and chancels, the Rev. Mr. *Dixon*, one of the canons, made a statement which was considered as a direct charge of simony against the dean. The dean was requested to attend, in order to meet the charge, and he did attend. The commissary required him in the first place to purge himself of the contempt, which he declined to do, and again absented himself, protesting against the proceedings, and saying, not by way of consent, but of defiance, that Mr. *Dixon* might go on to prove his charge in his absence. The learned com-

missary himself, satisfied with the proofs which were then adduced, pronounced the charge established in several cases, and gave judgment that the dean should be for that offence, as well as for contumacy, deprived of his office. Sentence to the like effect was afterwards solemnly pronounced by the archbishop.

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Prohibition is claimed on various grounds, and that which requires to be first considered is the late act of parliament 3 & 4 *Vict.* c. 86, for better enforcing church discipline, which recites, "that the manner of proceeding in causes for the correction of clerks requires amendment," repeals the act 1 *Hen.* 7, c. 4, prescribes the course of proceeding which shall thereafter be observed in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical," and finally enacts, "that no criminal suit or proceeding against a clerk in holy orders for any offence against the laws ecclesiastical shall be instituted in any ecclesiastical court, otherwise" than according to the provisions of that act. These enactments are, however, qualified by a proviso:—"That nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses which the archbishops or bishops may now, according to law, exercise personally and without process in court." The 23d section, enacting, "that no criminal suit or proceeding shall be instituted in any other manner than this act requires," was relied on as a decisive bar against the trial that has taken place. The counsel for the dean argued that he being a clerk in holy orders was prosecuted in a criminal proceeding for the offence of simony, a known offence against the laws ecclesiastical, and that the authority which assumes to deprive him is an ecclesiastical court, the Court of the ordinary holding his visitation. Two answers to this argument are offered:—1st. That what has been done is not a criminal proceeding within the meaning of the act. 2nd. That the proceedings were, by virtue of authority exercised by the archbishop, accord-

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ing to the law as it then stood, over a clerk of his province personally without process in court.

The learned counsel against the prohibition observed, in the first place, that the statute applied to *causes*—a word said to be well understood, and to import suits regularly promoted in the spiritual courts. But the employment of that word in the short preamble affords a most inadequate reason for an arbitrary restriction of the whole act in that form of proceeding, which in the ecclesiastical law may be with technical propriety described as a *cause*. It might as well be restricted to causes promoted for incontinency, the only class punishable under 1 *Hen. 7*, of which the repeal is the only object of the same section, after a recital that the manner of proceeding for correction of clerks ought to be amended. But, though the first section is thus limited, the general enactments are extended to all offences, and, in like manner, though *causes* are the only proceedings mentioned in the preamble, the 23rd section clearly provides that the course enjoined by the statute shall be pursued in every criminal suit or proceeding against a clerk in holy orders in the courts ecclesiastical. But is this a criminal proceeding, or is it merely an incidental fact arising out of the visitation, in the course of which it is brought to the ordinary's knowledge, and properly in the discharge of that duty inquired into by him, but not instituted as a criminal proceeding? The answer appears to be that, as soon as the visitor proceeds to examine the proofs of an ecclesiastical offence committed by a clerk, for the purpose of punishment by deprivation, more especially as in this case, at the instance of an accuser who avails himself of the aid of a professional advocate, a criminal proceeding is undoubtedly instituted and in full progress. There is yet another term in the description of suits or proceedings given by the 23rd sect. They must be in some "ecclesiastical court," the ordinary's visitation is said not to be an ecclesiastical court, but to range within the proviso (sect. 23), which prevents the statute from

applying to authority personally exercised by the bishop without process in court.

This brings us directly to the question, whether the bishop, as visitor of a dean and chapter, is legally invested with power to deprive the dean of his office for an ecclesiastical offence without process in court. If he has the power, he must derive it from the general words above cited ; but they can scarcely be expected to receive this construction, without proof that they have habitually and in former times, when church discipline was much more active than of late, been so construed, or, at least, that the learned writers on ecclesiastical law have put that meaning upon them.

Now, in the first place, there is no example of such a power being exercised by the bishops over their clergy even in their regular and solemn visitations. They are indeed exempted from the forms required by the common law, and are to proceed in the language found in many books, and copied in *Com. Dig. Visitor (C.)* " Summarie, simpliciter et de plano sine strepitu aut figura judicii," that is (adds *Comyns*), according to mere law and right. But some forms, as involving the opportunity of knowing and answering the charges, are absolutely necessary for securing this object. The Report of the Ecclesiastical Commissioners was appealed to on both sides ; on the one, for proof that the late statute was not meant to apply to the visitatorial power, because no recommendation to that effect is given. We have frequently had occasion to observe that the courts have no right to look at similar reports for the direct purpose of construing the statutes founded upon them, which must speak for themselves. On the other hand, the report was referred to as a depository of the former law, which is not, however, there said to have trusted the visitor with the power now claimed. It states that the ordinary was to proceed in the correction of clerks in a kind of forum domesticum ; however these words are to be understood, it was still a forum. Spiritual persons who offended were presented by the churchwardens, on whom this duty was

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cast; if they neglected it, others might present, or, even if common fame were the only accuser, the ordinary might make his inquiries. Different modes of dealing with the charges are enumerated: *Inquisitio*, *Accusatio*, *Denunciatio*. Articles were exhibited, and the party had time and place given to answer them. Sentence was at length passed by the ordinary, personally perhaps, but (according to all our experience) in his court, and in no usual sense of the words without process. And on this head of argument the question was asked, and not satisfactorily answered, why, if the ordinary possessed this power personally and without process, such great difficulties had been encountered and such enormous expenses incurred in bringing notorious spiritual delinquents to justice by deprivation? It is well known that the assumed want of the power now claimed formed one strong motive for introducing the new law.

The saving clause may not improperly have been intended to apply to some other powers of regulation and control vested by law in the archbishops and bishops: but, if none such could be surmised, still the effect of no such saving clause can be greater than the protection of something that is shewn to have existed, it cannot create authority in any one to act personally and without process in a particular case, by merely saying that the act does not deprive him of such authority in general terms. The precaution secures what the law recognized before, but the question remains, what did the law recognize?

We are aware that the jurisdiction of visitors has been described in most comprehensive terms by common lawyers of high authority. Lord *Holt* himself is cited as allowing them an arbitrary power in his often reported judgment on the case of *Philips v. Bury*; that copy of it taken from his own manuscript, and now printed in 2 Term Rep.(a), agrees almost word for word with that which is recorded by *Skinner*(b). Scarcely any other remark upon it requires to be made than that the case arose out of the

(a) p. 346.

(b) p. 447.

visitation of a charitable foundation. *Holt's* strong language is all applied to that case. The founder might do as he would with his own; the parties deriving benefit from his endowment must abide by the conditions which he has annexed. *Cujus est dare ejus est disponere*. *Lucy v. The Bishop of St. David's*(a), where the Archbishop of Canterbury gave sentence of deprivation against one of his suffragan bishops for simony and other ecclesiastical offences, was supposed to shew that power to reside in the breast of the archbishop without any rules or forms. Prohibition was claimed, on the ground that the citation was to appear at Lambeth, not in the usual place of holding the metropolitan court, and it was answered here by Lord *Holt* and his brethren that the archbishop "may hold *his court* where he pleases, that the *spiritual court* might proceed to punish him for any offence done against his duty as a bishop," adding, "as the clergy are subject to different rules and duties, it is but reasonable that, if any ecclesiastical person offend in his ecclesiastical duty, he should be punishable for it *in the ecclesiastical court*." These expressions all occur in *Salkeld's* report. The bishop was called *by citation* to answer for his delinquency. The form and mode of proceeding were objected to in no other particular than the place of sitting. We scarcely need say that this case supplies no evidence of the right to proceed personally without process in Court.

Another case was cited for the same purpose, *The Bishop of Kildare v. The Archbishop of Dublin*(b), brought by writ of error to the House of Lords, 1724. The bishop, as dean of the Holy Trinity, complained that the archbishop proceeded against him in Court Christian for a contempt committed during the visitation. The principal question intended to be raised was, whether the king or the archbishop was the visitor of the dean and chapter of that cathedral, and, this being decided in favour of the archbishop, all others respecting the mode of proceeding were comparatively unimportant, nor indeed does the case fur-

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(a) 1 *Ld Raym.* 447, 539; *S. C.* 1 *Salk.* 134. (b) 2 *Bro. P. C.* 179.

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nish us with a very full detail of what took place. Enough however appears to shew that the offence was contumacy, committed by shutting the doors of the cathedral against the archbishop, and not appearing in his visitation, and that the archbishop impleaded the plaintiff as dean in the Court Christian "in causâ visitationis ordinarii ipsius archiepiscopi," under pretence of the contempt. The House of Lords held that the right of the archbishop to visit the dean and chapter was established, and that "the manner of his doing so was not at all material, because any error or defect in the manner might be remedied by appeal, and was no foundation for a prohibition," and this is the marginal note appended to the report, the general point being perfectly clear that when there is jurisdiction the manner of exercising it affords no ground for prohibition. But the declaration, instead of alleging that the visitor proceeded to sentence (whatever that sentence might be, for it is not set forth,) personally and without process, leads to the contrary inference. The words above extracted from it are rather descriptive of a suit afterwards commenced by the archbishop in his court as ordinary, and this even where the offence was a direct contempt of his person and authority. But it is enough to say, and indisputably true, that this case does not establish the proposition for which alone it was wanted, that the visitor has lawful power to deprive personally and without process in court. So, in the *Bishop of Exeter's* case, in *Wilson* and in *Blackstone*(a), the acts of the bishop, having been performed within his jurisdiction as visitor of Exeter college by appointment of the founder, were held by this Court to be uncontrollable by it. Such decisions can have no bearing on the present case, unless it were shewn that all the powers which any founder has conferred on his visitor grow out of the relation of an ordinary to his clergy on his holding a visitation of them. It is highly probable that the use of the same word on two such different occasions has led to the belief that such was the law. The opinion is thus accounted for,

(a) See *Rex v. The Bishop of Chester*, 1 W. Bl. 22; 1 Wils. 206.

but the law can only be established by practice and precedent; both are wanting here.

Some of the books speak of a *court* of visitation, and the phrase is not incorrect. It is an authority acting with certain forms of procedure and inquiry, suspending its proceedings from time to time by adjournment, making certain orders and decrees. Whether or not these acts are of necessity judicial, those done in the course of establishing a charge against a party accused bear that undoubted character.

The authority now challenged declared the party in contempt for withdrawing himself after citation, and required him to purge his contempt before he could be heard in his defence against charges preferred. It proceeded then with the examination of witnesses in support of these charges, and finally adjudged him guilty and awarded sentence of deprivation.

All these are assuredly the acts of a court. It is admitted that they may be appealed against, and we are at a loss to conceive an appeal against any proceedings but those of a court. That court however the late statute has divested of all such jurisdiction. It is not within the saving clause, which leaves untouched the ordinary's power over his clergy, as it might then be exercised by law without process in court, because this power does not appear to have been ever exercised by law. We are constrained to conclude that the most reverend prelate, in so far as he proceeded at his visitation to deprive the dean, has acted without jurisdiction.

Finding that this preliminary obstacle is not to be surmounted, we decline to enter upon the consideration of the numerous points raised in certain portions of the proceedings by the learned commissary. But there is one not unfit to be disposed of.

The sentence being final and executed, it was argued that nothing now remained which this Court could prohibit from being done, and not even a continuing Court to which our writ could be addressed. These arguments, for obvious reasons, require to be narrowly watched; for they

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would give effect to unlawful proceedings, merely because they were brought to a conclusion. But to the present case they are inapplicable. For, on looking at the sentence, we find that it admonishes the dean not to exercise the functions of dean on pain of the greater excommunication, and that the Court was adjourned only when this motion was made. The infliction of that pain would be the mode of enforcing the sentence and this we may prohibit, and we find in some of the entries that this Court has enjoined revocation of the sentence. The dean could not apply before sentence, for the sentence of deprivation is the only thing done which is beyond the jurisdiction of the archbishop. Up to that point he had unquestionably power, for it was his duty to inquire with a view to ulterior proceedings, and it seems that the Lord Chancellor discharged an application for prohibition which had been made to him before sentence on that very ground. Our clear conviction is not embarrassed by an opposite judgment formed by the learned commissary, for he does not appear to have adverted to the statute during the whole proceedings. We cannot but believe that it escaped his attention, occupied as it was with a vast variety of unusual circumstances, and not assisted (as indeed it could not be according to the view which he took of the duties of his office) by advocates on both sides. If we felt any doubt we should be bound to invite further discussion by calling upon the Dean of York to declare in prohibition, but, after the full and deliberate long prepared and maturely digested arguments which we have heard enforced with consummate ability by counsel of the greatest learning and of the highest reputation, no additional light can be expected. We owe it to all the parties to save them the inconvenience and anxiety of fruitless delay—we owe it to the public, and, in a peculiar manner to the church, to encourage no doubt, when we feel none, on subjects of such immense importance, and so deeply affecting its interests, its rights, and its duties.

D.

Rule absolute.

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ASSUMPSIT for 20*l.*, money had and received, and on an account stated.

Plea: non assumpsit and issue thereon.

The following were the plaintiff's particulars of demand:

"This action is brought to recover the sum of 5*l.* 5*s.*, paid by the plaintiff to the defendants on the 30th January last, in order to obtain possession of certain goods belonging to the plaintiff, then in the custody of the defendants; and which said sum of 5*l.* 5*s.* was paid by the plaintiff under protest that he was not liable to pay the same, *or any part* thereof; or, if liable to pay some part thereof, that the sum claimed by the defendants, viz. the sum of 5*l.* 5*s.*, was an *exorbitant* and unreasonable claim.

"Above are the particulars of the plaintiff's demand in this action, for the recovery whereof he will avail himself of all or any of the counts of the declaration as he may be advised."

The cause was tried before *Coleridge J.* at the Middlesex sittings after Hilary term, 1841.


It appeared that a van of the defendants, who were ware-housemen in London, had been sent with furniture into the country and was about to return empty, and that the plaintiff, who was a farmer, had taken the opportunity of sending by it to London the goods referred to in his particulars of demand. The plaintiff adduced evidence, which was contradicted by the evidence for the defendants, to shew that his

(a) Decided at the sittings after term (Feb. 4).

on their answering that they did, he paid it under protest. He then brought assumpsit for money had and received, stating in his particulars that the action was brought to recover 5*l.* 5*s.* paid to recover his goods, and which sum was paid under protest that he was not liable to pay the same, *or any part thereof*, or, if liable for some part, that 5*l.* 5*s.* was an exorbitant charge. The jury found that the defendants were entitled to 1*l.* 10*s.* 6*d.* for the carriage.

Held, that, under the circumstances, with reference especially to the defendants' insisting on the entire charge of 5*l.* 5*s.*, that the action lay for the overcharge, although the plaintiff had made no tender of the sum really due.

The defendants carried goods for the plaintiff and lodged them in their warehouse. The plaintiff, conceiving that they had agreed to charge nothing for the carriage, claimed to receive them without paying for it. The defendants made a charge of 5*l.* 5*s.* The plaintiff applied again, and, on the same charge being made, stated that he considered it exorbitant, and also that he did not consider himself liable to pay anything. He afterwards applied a third time, and asked whether defendants persisted in detaining the goods until the whole charge was paid, and,

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goods were to be carried for nothing. The goods, on their arrival in London, were lodged in the warehouse of the defendants. When the plaintiff, some time afterwards, applied to have them delivered up to him, a charge of 5*l.* 5*s.* was made for carrying and warehousing them was made. The plaintiff's attorney afterwards called on the defendants and told them that he thought the charge exorbitant, and also that the plaintiff did not consider himself liable to pay any thing under the circumstances. The defendants refused to deliver up the goods without payment of the charge. The plaintiff's attorney called again a few days afterwards, and asked whether the defendants persisted in detaining the goods unless the whole charge was paid, and, on receiving an answer in the affirmative, he paid the 5*l.* 5*s.* under protest. On this the goods were returned.

At the trial it was contended for the defendants, upon the evidence, that their charge of 5*l.* 5*s.*, for which they had detained the goods, was a proper charge; and that, even if it was an overcharge, the plaintiff could not recover the excess as money paid and received to his use, because he had not tendered the sum really due. In answer to questions from the learned judge, the jury found that the defendants were entitled to charge 1*l.* 10*s.* 6*d.*, being 18*s.* for the carriage, and 12*s.* 6*d.* for warehousing. The learned judge, being of opinion that the action could not be maintained, as there had been no tender of what was due to the defendants, nonsuited the plaintiff, giving him leave to move to enter a verdict for 3*l.* 14*s.* 6*d.*, the difference between the 5*l.* 5*s.* paid by him and the 1*l.* 10*s.* 6*d.*, which the jury found he ought to have paid, if the Court should be of opinion that the action would lie without any tender of the amount for which the defendants had a lien upon the goods.

Byles, in the Easter term following, having obtained a rule accordingly,

Kelly and *Cockburn* now shewed cause. This action is without precedent. The detention of the plaintiff's goods

was not wrongful, something was due in respect of them, which gave the defendants a lien; and, though the defendants claimed, and the plaintiff paid, more than was due, yet the plaintiff cannot bring money had and received to recover back the excess, inasmuch as he did not tender what was due. [*Patteson J.* I suppose it is admitted that the action would lie if the plaintiff had tendered the 1*l.* 10*s.* 6*d.* due.] That is not admitted, though it is only necessary to contend that the action will, at all events, not lie, as the 1*l.* 10*s.* 6*d.* was *not* tendered, for, to allow such a form of action, even where there has been a tender, is to confound remedies. In *Lindon v. Hooper* (a) it was held, that money had and received would not lie to recover back money paid for the release of cattle damage feasant, though the distress was wrongful. [*Patteson J.* There was nothing due there; the detention was wrongful altogether, and the decision rests upon the ground that the plaintiff might have got his goods by course of law in an action of replevin, but *Astley v. Reynolds* (b), which has never been impugned, establishes that, where more money than is due is extorted by duress of goods, the plaintiff may, after tender of what is due, bring money had and received for the residue.] In *Skeate v. Beale* (c), where it was held that an agreement entered into to pay money under duress of goods is not void, the Court takes the opportunity of stating that, "even if the money had been paid instead of the agreement to pay it entered into, no action for money had and received could have been sustained," and refers to *Lindon v. Hooper* (a) and *Knibbs v. Hall* (d). [*Coleridge J.* mentioned *Duke de Cadaval v. Collins* (e).] There nothing whatever was due, and the money was obtained by duress of person; if the arrest there had been merely for *more* than was due, the plaintiff could not have sustained his action. If the money due in this case had been tendered and refused, the lien of

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(a) Cowp. 414.

(d) 1 Esp. 84.

(b) 2 Str. 915.

(e) 4 A. & E. 858; S. C. 6 N.

(c) 3 P. & D. 597.

& M. 324.

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the defendants would have been lost and the detainer have become wrongful, so that the plaintiff might have maintained trover. But, so far from tendering what was due, the plaintiff then denied that anything was due, and denied it also in his particulars of demand, for he claims by them the entire 5*l.* 5*s.*, and it is only by way of recital that the charge is referred to as exorbitant. The defendants therefore had no opportunity of accepting what was their due, and the question of the amount due to them for carriage is left to be tried in this action, and the defendants must contend that the action would have been equally maintainable if they had charged the plaintiff a single penny more than the jury have allowed them. Money had and received is an equitable form of action, and the plaintiff was bound to do equity before action, by tendering to the defendants their due. Even in trover, which is an action strictissimi juris, against a pawnbroker, it has been held that, before a party can entitle himself to relief from a usurious contract, he must tender the money borrowed: *Fitzroy v. Gwillim* (a). That case has certainly been doubted in *Tregoning v. Attenborough* (b), which was also an action of trover, but the principle of it is certainly applicable to the present equitable form of action. But trover certainly could not have been brought if the defendants had claimed 1000*l.* for the goods, when only a shilling was due, and à fortiori money had and received cannot be brought. [Lord Denman C. J. The defendants might have done equity by telling the plaintiff what really was due.] In *Shaw v. Woodcock* (c) and *Morgan v. Palmer* (d) nothing was due from the plaintiff. In *Astley v. Reynolds* (e), which is the only case like the present, the plaintiff did owe something, but he tendered it twice before action.

(a) 1 T. R. 153.

(b) 7 Bing. 97.

(c) 7 B. & C. 73; S. C. 9 D. & R. 889.

(d) 2 B. & C. 729; S. C. 4 D. & R. 283.

(e) 2 Str. 915.

Erle and *Byles* contra. The whole question is, whether a tender of the 1*l.* 10*s.* 6*d.* was necessary to the plaintiff's right of action in this form. There is no authority for saying that the tender was necessary, and *Scarfe v. Halifax* (a) is an authority for saying that it was unnecessary. Moreover, in *Morgan v. Palmer* (b), *Shaw v. Woodcock* (c), *Irving v. Wilson* (d), *Dew v. Parsons* (e), *Hills v. Street* (f), *Atlee v. Backhouse* (g), which are all of them cases bearing closely on the present question, there is no trace whatever of the proposition contended for by the defendants. In the last-mentioned case *Parke B.* says, "There is no doubt of the proposition that, if goods are wrongfully taken, and a sum of money is paid, simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back." *Knibbs v. Hall* (h) was decided on the same ground with *Lindon v. Hooper* (i), that the plaintiff need not have paid the money to save his goods, as he had a direct remedy by replevin. [*Patteson J.* I think, in some of the cases just cited, the sum due, if any, was known, and the plaintiff had not put himself into a wrong position by seeking to recover more than he had a right to.] In *Dew v. Parsons* (e) and *Hill v. Street* (f) there was uncertainty as to the sum due, but it is in the plaintiff's favour that the sum due in this case was uncertain, for the plaintiff could not know what to tender, and received no information from the defendants. It would be unreasonable that the plaintiff should be obliged to tender when the amount is unknown, and should not be so obliged where the amount is known. If the plaintiff had tendered 5*l.* 5*s.* he would be entitled to recover in this form of action, for he could not be hurt by tendering too much. Instead of tendering 5*l.* 5*s.*

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(a) 7 M. & W. 288.

(b) 2 B. & C. 729; S. C. 4 D. & R. 283.

(c) 7 B. & C. 73; S. C. 9 D. & R. 889.

(d) 4 T. R. 485.


(e) 2 B. & Ald. 562.

(f) 5 Bing. 37.

(g) 3 M. & W. 633.

(h) 1 Esp. 84.

(i) Cowp. 414.

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he has paid it, which is more. [*Patteson J.* If he had tendered 5*l.* 5*s.*, how could he recover back any part of his tender?] The plaintiff recovered back part of his tender in *Astley v. Reynolds* (a), and the only notice taken of the tender there is, "we do not think the tender of the 4*l.* will hurt him;" there is no intimation that the tender was a necessary part of his case. [*Patteson J.* I think it would be difficult at this time of day to say that a man may tender more than is due, and afterwards say less was due and recover part of his tender.] But the particular circumstances of this case shew that the tender, if necessary in general, was dispensed with, for when the plaintiff's solicitor, on his second application for the goods, inquires whether the defendants still insist on the 5*l.* 5*s.*, he is told that they do, after which the tender of a less sum would have been an empty form. It is to be observed that, both before action and in his particulars, the assertion of the plaintiff is not absolute that nothing is due from, but, in the alternative, that, if anything is due, 5*l.* 5*s.* is too much.

Lord DENMAN C. J.—According to the view taken by the jury of this case, each party has put himself in the wrong. It seems that there was no express bargain between the parties; that the defendant had possession of the plaintiff's goods, and conveyed them to London, that the plaintiff claimed to pay nothing for the carriage, and the defendants claimed to receive 5*l.* 5*s.*, and that the plaintiff paid that sum under protest, in order to get back his goods. It turns out that neither the one version of the bargain or the other is correct, but that the plaintiff was to pay something, and that 1*l.* 10*s.* 6*d.* was enough. The defendants then have some of the plaintiff's money. Has any thing occurred to deprive the plaintiff of his title to this money? It is said that the plaintiff should have tendered what was due to the defendants for carrying his goods. I think not, and that it might rather have been expected, under the

(a) 2 Str. 915.

circumstances, that the carriers should have specified the sum due to them, for they would best know the proper sum. So much for the equity of the case. The effect of the communications by the plaintiff before action, and of his particulars of demand, seems to me to be that he denies that he ought to pay the whole amount claimed, or any part—in the alternative. I think there is nothing to prevent the plaintiff from bringing this action to recover what he has overpaid the defendants in order to get possession of his goods. The authorities which point the other way seem to have proceeded on the ground that, in those particular cases, the law had provided the plaintiff with a direct mode of getting his goods back.


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PATTESON J.—I should be very sorry that any doubt should be thrown upon the general doctrine that money had and received will lie to recover back money paid to obtain possession of goods wrongfully withheld, either where nothing is due for them, or where something is due, and more has been claimed. That general proposition, which part of the argument for the defendants appeared to me to impugn, has been established by so many cases, that it would be wrong to unsettle it. In *Lindon v. Hooper* (a) the plaintiff had, by the known remedy of replevin, the means of getting his goods back without paying for them. My only doubt has been whether, assuming the general proposition before adverted to, the plaintiff, this being a case in which something was due in respect of the goods, was not bound to tender the sum due for them, and *Astley v. Reynolds* (b), in which there *was* a tender, certainly appeared to me to be against the plaintiff on this point. But, without going the length of saying that where goods are withheld, and the party withholding them demands money before giving them up, and the owner says, "I owe you nothing for them, and will pay you nothing," but afterwards pays the sum demanded, he may bring money had and received for the

(a) Cow. 414.

(b) 2 Str. 915:

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overcharge, though he did not tender what is due, which would be a deception upon his opponent, it is sufficient to say that is not the present case. For it seems that, when the demand for the goods was made by the plaintiff's attorney, he said not only that the defendants were entitled to charge nothing, but *also* that they had charged too much, and there was a subsequent conversation, when he asked whether they persisted in their *whole* charge, and was told that they did. The plaintiff therefore never entirely insisted that nothing was due, and when he brought his action, gave notice by his particulars, that if liable for any thing he was not liable for *so much*. The defendants might have paid money into Court, and, if the plaintiff had gone on, he would have been beaten. Under the circumstances of this case, I think no tender was necessary to sustain the action.

COLERIDGE J.—I am entirely of the same opinion. I never doubted where money is paid to recover goods from a person wrongfully detaining them, that it may be treated as money had and received, and *Skeate v. Beale* (a) is not at all inconsistent with this. That was an action on a written agreement to pay a sum of money, and the defendant, in his plea, sought to avoid the agreement, by shewing that he had been induced to enter into it for the purpose of recovering his goods, which had been wrongfully distrained, and the Court held that duress of *goods* was not such a constraining force as to avoid the agreement. It is true there may be expressions in the judgment which go beyond the point decided, but the decision itself is, I think, right, and quite consistent with our decision in the present case. The only question here is as to the necessity of the tender. The action is not brought to recover the whole *5l. 5s.* absolutely, for, though the particulars at the commencement claim the whole sum, yet they are afterwards expanded, and information is given to the plaintiff that the claim is, in the alternative, for the whole sum, or for such part as

(a) 3 P. & D. 597.

may have been overpaid. Was then a tender on the part of the plaintiff necessary under the circumstances? The defendants begin in the wrong by demanding an exorbitant sum for the carriage of the plaintiff's goods. On whom did the knowledge lie of what was the proper sum to charge, on the plaintiff the farmer in the country, or on the defendants the carriers? The ordinary course would be for the carrier to send in his bill. However here the defendants make a demand, which is found to be unreasonable, and persist in it to the last. Under the circumstances of this case I think no tender was necessary.

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D.

Rule absolute.

SMITH v. CLINCH (a).

SPECIAL demurrer to a replication on the ground that it was "double."

A special demurrer for duplicity must point out in what the duplicity consists.

W. H. Watson appeared in support of the demurrer.

Whateley contra, objected that the ground of demurrer could not be gone into, as the demurrer did not state in what respect the declaration was double, and referred to 1 *Wms. Saund.* 337 b, n. (3), which cites, among other authorities, *Lamplough v. Shortridge* (b), where it was said, "in demurrer for duplicity it is not sufficient to demur quia duplex est, or duplicem habet materiam; but the party must shew wherein; for the statute by requiring to shew cause, intended to oblige the party to lay his finger upon the very point. Per *Holt C. J.*" He referred also to the rule of Court in Common Pleas, s. xx. 1654, "that according to the statute of 27 *Eliz.* (c) upon demurrers, the causes be

(a) Decided at the sittings after
Trinity Term (Feb 2.)

(b) 1 Salk. 219.

(c) C. 5.

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specially assigned, and not involved with general unapplied expressions of double, negative pregnant, uncertain, wanting form, and the like, but to shew specially wherein, that the other may (as the case shall require) either join in demurrer, or amend, paying costs, or discontinue his action. That it be declared that matters of form, as well on the part of him that demurs, as of him that joyns in all parts of the pleading are discharged, unless such as are specially assigned upon the demurrer."

Per CURIAM (a).—The demurrer should have pointed out in what the duplicity consists.

D. Judgment for the plaintiffs.

(a) Lord Denman, Patteson and Coleridge Js.

ELEANOR THOMAS v. BENJAMIN THOMAS (b).

An agreement between the defendant, who was the executor, and the plaintiff, who was the widow of a testator, recited that the testator had verbally declared his desire that his

widow should have his dwelling-house, and then proceeded thus, "now these presents witness, and it is hereby agreed and declared, that in consideration of such desire" the defendant would convey the dwelling-house to the plaintiff "provided nevertheless, and it is hereby further agreed and declared, that the said &c., (the plaintiff) shall pay to &c. (the defendant) the sum of 1*l.* yearly, towards the ground rent payable in respect of the said dwelling-house, and other premises thereto adjoining, and will keep the said dwelling-house and premises in good and tenantable repair."

Held, that the stipulation as to the payment of the 1*l.* ground rent and the repair was not a mere proviso, and that it contained the real consideration for the defendant's promise to convey the dwelling-house.

That the consideration was good, because the 1*l.* being payable for the house and other premises also, and payable to the defendant himself, did not appear to be incident to the house, as a specific burden, for which the defendant was liable to any superior landlord, and so to be a mere diminution of the gift itself; and that, in declaring upon the agreement, the reference to the testator's desire was properly omitted, as being irrelevant to the consideration.

ASSUMPSIT. The declaration stated that, on the 13th November, 1837, by an agreement made between the plaintiff and the defendant, it was agreed (among other things) as follows; that is to say, that the defendant should and would, when thereunto required by the plaintiff, by all necessary deeds, conveyances, &c. grant, convey, &c. a cer-

(b) Decided at the sittings after term (Feb. 5).

tain dwelling-house unto the plaintiff for her life, or so long as she should continue a widow and unmarried, and that the plaintiff should at all times during which she should have possession of the dwelling-house pay unto the defendant and one *S. T.* (since deceased), their executors, &c. the sum of 1*l.* yearly, towards the ground rent payable in respect of the said dwelling-house and other premises thereto adjoining, and should keep the said dwelling-house and premises in good and tenantable repair. And the said agreement being so made as aforesaid, afterwards, to wit, &c. (mutual promises).

Breach (after the necessary averments), that the defendant would not convey.


The material pleas were—1. Non assumpsit.

2. That there was not nor is there the said consideration in the declaration alleged for the said promise of the defendant therein mentioned.

Issue thereon.

At the trial before *Coltman J.*, at the Glamorganshire spring assizes, 1841, it appeared that the plaintiff was the widow and the defendant the surviving executor of one *John Thomas*. That the testator, who died in November, 1837, had by his will, dated in August of the same year, directed his executors to take possession of his houses, money, and other effects, subject to the payment (amongst other bequests) of a legacy of 100*l.* to the plaintiff, and an annuity of 20*l.* during her widowhood. After making his will, the testator had repeatedly declared that it was his desire that the plaintiff should have the option either to take, during her widowhood, the house (mentioned in the declaration) in which he lived, and give up the legacy of 100*l.*, or to accept the legacy instead of the house.


A written agreement was also put in evidence, entered into shortly after the testator's death, between his executors and the plaintiff. The agreement recited the will, and then proceeded thus:—"And whereas the said testator shortly before his death declared, in the presence of several

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witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling-house and premises in which he then resided, and should have and enjoy to her own use all the remainder of his household furniture, plate, linen, china, and all his stock in trade, brewing utensils and other effects, in his dwelling-house at the time of his decease, &c. &c.; or, in case the said *Eleanor Thomas* should think proper, she might have and receive from his personal estate the sum of 100*l.* in lieu of such house and premises, either of which should be in addition to the respective legacies and bequests given her in and by his said will, but such declaration and desire was not reduced to writing in the lifetime of the said *John Thomas*, and read over to him, but the said *Samuel Thomas* and *Benjamin Thomas* (the executors) are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect: Now these presents witness, and it is hereby agreed and declared, by and between the parties hereto, that *in consideration of such desire and of the premises*, they the said *S. Thomas* and *B. Thomas*, their executors, administrators or assigns, shall and will, when thereunto required by the said *E. Thomas*, by all necessary deeds, conveyances, assignments or other assurances, grant, convey, assign and make over or otherwise assure, all and singular the said dwelling-house and premises, with the appurtenances, unto the said *E. Thomas*, or her assigns, for her life, or so long as she shall continue a widow and unmarried, and also the said remaining part of the household furniture, &c. &c.: *Provided nevertheless*, and it is hereby *further agreed* and declared, that the said *E. Thomas*, or her assigns, shall and will at all times during which she shall have possession of the said dwelling-house and premises, pay unto the said *S. Thomas* and *B. Thomas*, their executors, administrators or assigns, the sum of 1*l.* yearly, towards the ground rent, payable in respect of the said dwelling-house and *other premises* there-

unto adjoining, and shall and will keep the said dwelling-house and premises in good and tenantable repair; and it is hereby lastly agreed and declared that, if at any time during her life or widowhood, the said *E. Thomas* shall be desirous of giving up possession of the said dwelling-house and premises unto the said *S. Thomas* and *B. Thomas*, their executors, administrators or assigns, they, some or one of them, shall and will pay unto the said *E. Thomas*, or her assigns, the sum of 100*l.*, and accept a conveyance and assignment of the said dwelling-house and premises."

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The learned judge gave leave to move to enter a nonsuit, if the Court should be of opinion that the agreement was invalid for want of consideration, and a verdict was given for the plaintiff, damages 100*l.*

E. V. Williams, in Easter term following, having obtained a rule nisi,

Chilton and *W. M. James* now shewed cause. The promise on the part of the plaintiff to pay the 1*l.* ground rent and to repair is in itself a good legal consideration for the promise on which the defendant is sued, and the testator's "desire," "in consideration" of which it is stated that the defendant made the promise, being merely the motive, and no part of the legal consideration, is altogether immaterial, and has properly been omitted in the declaration. "Where, in an assumpsit, two considerations are alleged, the one good and sufficient, the other idle and vain; if that which is good be proved it sufficeth; and, although he fail in the proof of the other, it is not material, because it was vain to allege it; but, if both be good, both must be proved:" *Bull. N. P.* 147 a. In the case of almost all agreements, the parties making them are influenced by moral as well as legal considerations, but in law the motives and inducements of the parties are irrelevant, and the strict legal consideration alone is looked to. Where a declaration alleged a demise of a house at a certain rent, and the proof was of a demise of a house together with the furniture, it was held that, as

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in point of law the rent issued out of the real property entirely, and not out of the furniture, it was sufficient for the plaintiff to allege the demise of the real property only: *Farewell v. Dickenson* (a). The mutual promises, as laid in the declaration, were alone the legal consideration for the agreement, and they were proved as laid.

E. V. Williams contra. It is not intended to dispute that, where a good consideration is *conjoined* with an ineffective consideration, the latter may be disregarded. But here the *only* consideration whatever is respect for the wishes of the testator, and, as that consideration is not stated in the declaration, the declaration was not proved. The promise of the defendant to pay 1*l.* ground rent and to repair, which is the consideration relied on, was proved by the agreement itself, and by the other evidence in the case, not to have been the consideration. It comes in the agreement by way of proviso merely, and could not have been treated as a consideration. The mention of "ground rent" in the agreement shews that there was a superior landlord, and the proviso for payment of the 1*l.* ground rent and for the repairs, does no more than annex to the gift those burdens which are naturally incident to it: *Burnett v. Lynch* (b). It is now sought to turn that which is an onus charged upon the gift, and is no more than a diminution of it, into a consideration for making the gift. [*Patteson* J. How does it appear that the defendant was bound to repair?] The "ground rent" mentioned in the agreement, which shews that there was a superior landlord, is sufficient evidence of the liability. If the consideration stated is a good consideration, it would be good if carried out into a conveyance, notwithstanding the 27 *Eliz.* c. 4, and a subsequent purchaser would lose the estate. Yet it cannot be contended that a conveyance of land by a man to his child, provided that the donee will keep up a monument lying on


(a) 6 B. & C. 251; S. C. 9 D. & R. 245.

(b) 5 B. & C. 589; S. C. 8 D. & R. 368.

the land, in commemoration of one of the donor's ancestors, or will not cut down a particular tree, would not be a voluntary conveyance, and void against a subsequent purchaser. Where property is settled on a distinguished general, on condition that he annually present a banner to the monarch, the presentment of the banner is no consideration but a condition, the real consideration is military service. So if a horse is given to a man, provided that he will give the horse an extra feed of corn every time it is ridden a certain number of miles, this stipulation would form no consideration. In the present case the wishes of the testator are mentioned in that part of the agreement where the amount of purchase-money would naturally be introduced, there the consideration, such as it is, is to be found, and the rest is mere proviso. He also referred to the authorities cited in *Chitty on Contracts* (a), p. 23, upon the subject of nuda pacta.

Lord DENMAN C. J.—There are no real difficulties in this case, although a great deal of ingenuity has been displayed in suggesting them. The agreement does not shew that the 1*l.* which the plaintiff is to pay was chargeable upon the dwelling-house in question as a ground rent, for which the defendant and his co-executor were liable to a superior landlord. The 1*l.* is stated to be payable in respect of “other premises thereto adjoining,” as well as in respect of the dwelling-house, so that the payment cannot be treated as an ordinary burden annexed to the dwelling-house, and a mere diminution of the gift. The payment therefore is in itself a good consideration. It is also sufficiently stated as being the actual consideration. The part of the agreement where the payment is stipulated for is not a mere proviso, for the language is, “Provided nevertheless, and it is hereby further agreed,” that the plaintiff shall, so long as she is in possession of the dwelling-house, pay the yearly sum of 1*l.* It is also agreed that she shall repair, which of itself might be a consideration of great value. There is therefore a good legal consideration, which

(a) 2d ed.

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is altogether independent of the feeling that actuated the defendant in entering into the contract.

PATTESON J.—The motive for the executors making the agreement appears to have been respect for the wishes of their testator. Motive, however, is in a legal point of view distinct from consideration. The consideration must move from the plaintiff; here the motive, which it is sought to turn into the consideration, does not move from the plaintiff, but from the testator, if from any one. But it is said that, as this motive is the *actual* consideration, and is worthless as such, that the agreement is without consideration and becomes a voluntary gift. But there is an express agreement, not a mere proviso, that the plaintiff shall pay the yearly sum of 1*l.*, which was probably part of an entire sum, payable as ground rent for the dwelling-house and the other premises mentioned, and the 1*l.* is to be paid, not to a superior landlord, but to the defendant himself. The payment therefore does not appear to be a burden incident to the house. So again, as to the agreement by the plaintiff to repair, it may be that under a lease from the ground landlord the defendant was bound to repair. But we know nothing of the matter; the obligation to repair may be created for the first time by this agreement. It is said that if this clause, which is called a proviso, had occurred in a conveyance, the conveyance would nevertheless be voluntary and void as against a subsequent purchaser, under the statute of the 27th *Elizabeth*. I do not say how that might be, but, even supposing that the conveyance would be void against a subsequent purchaser, it would be good against the conveying party.

COLERIDGE J.—The concession, that it is not necessary to set out mere motive, when conjoined with a good consideration, seems to dispose of the case. We are not tied up to look in any particular part of an instrument for the consideration. Undoubtedly in that part of this agreement where the consideration is usually to be found there is

nothing more than a pious reference to the wishes of the testator. But in another part of the instrument there is an express agreement by the defendant to pay 1*l.* a year for a particular purpose, in respect of the dwelling-house and other premises, and to repair. That agreement would clearly be a good consideration, if introduced in the usual part of the instrument, and is not the less a good consideration because it is not found in the usual place. As to the argument that, if this consideration were carried out into a conveyance, the conveyance would be void against a purchaser, I doubt whether that would be so, for I think the payment of the 1*l.* would form such a consideration as would support the deed. It is clear, I think, that the payment of 1*l.* ground rent is a thing newly created; it is to be paid not to the landlord, but to the defendant, and in respect not of the dwelling-house only, but also of other premises.

D.

Rule discharged.

The QUEEN *v.* BARNES and another(*a*).

RULE to shew cause why an order of the Court of Quarter Sessions for the county of Derby should not be quashed for insufficiency. At the Derbyshire quarter sessions, held on the 7th April, 1840, an appeal was brought by *Barnes* and another, surveyors of the hamlet of Beard, in the county of Derby, against an order of three justices of the peace, adjudging a sum of 88*l.* to be paid by the said *Barnes* and another to the treasurer of a certain turnpike road. The sessions quashed the order, subject to a case to be submitted to this Court.

This Court, upon argument in Michaelmas term, 1841, ordered the case to be sent back to be re-stated.

(*a*) Decided Trinity term, 1842, June 13.

proceed at such sessions, which notice may in such a case be given by the respondents.

Serving a copy of the rule of this Court, directing the case to be re-stated, will not dispense with such service of a notice.

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Where an order of justices has been quashed on appeal, subject to a case, and this Court directs the case to be re-stated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order without a notice by one of the parties to the other of an intention to proceed.

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The respondents served a copy of the order for the re-stating of the case on the appellants, but they gave no notice of any intention to appear at the next sessions for the purpose of having the case re-stated, or otherwise; nor was any notice of an intention to do so given by the appellants. The respondents appeared at the next sessions, the appellants did not, and the Court of Quarter Sessions made an order, which concluded as follows :

“ And the Court of Queen's Bench having, upon hearing counsel on both sides, directed the order returned with the writ of certiorari to be sent back to the sessions to be re-stated, and the said appellants not now appearing to prosecute the said appeal against the said order of the said justices, this Court doth order that the said order of the said three justices be and the same is hereby confirmed.”

The ground of the motion was, that the rehearing of the case having been had without any notice of trial, or of intention to proceed at the next sessions, the Court of Quarter Sessions had no jurisdiction.

Sir *F. Pollock* A. G., *Wildman* and *Griffin* shewed cause. It was the duty of the appellants to give notice of trial; if they did not, the respondents might nevertheless appear without notice at the next sessions; such is the practice of the Derbyshire sessions. The appellants therefore could not object to a want of notice from the respondents. The respondents were not even bound to serve on the appellants a copy of the rule of this Court, but, as they have done so, that was equivalent to a notice to proceed at the next sessions. Suppose there had been an entry and respite of an appeal, would not service of the order respecting the appeal be a sufficient notice (a) ?

But this Court is not a court of appeal from the decisions of the justices in cases where they have jurisdiction, unless its opinion is taken in the usual form by the submission of a case. Here the sessions had jurisdiction; it

(a) See *Rex v. Lambeth*, 3 D. & R. 340; 2 Nol. P. L. 532.

was competent to them to frame rules for the government of the practice of their own court; they have done so, and, as they have acted upon them, this Court cannot interfere; *Rex v. James(a)*. Their judgment is final, though it may have even been entered wrong by mistake; *Rex v. Justices of Leicestershire(b)*.

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N. R. Clarke and *Whitehurst* contra. The sessions had no power to interfere, except by virtue of the order of this Court. The respondents were bound to give the appellants notice of their intention to appear at the next sessions. If no step had been taken by either party, the order of sessions quashing the order of the justices would have remained.

LORD DENMAN C. J.—The party who wishes to relieve himself from the burden ought to give the notice necessary to put the Court in motion(c). The case is distinguishable from the case of an ordinary appeal.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

(a) 2 Mau. & S. 321.

(b) 1 Mau. & S. 442.

(c) The following passage in 2 Nolan, P. L. 611, was supposed, apparently with very little reason, to lay down a different rule. "But as it (a rehearing) has been compared by the judges to proceedings upon a new trial, it seems as if the appellant ought to serve a fresh notice, in the same manner as the plaintiff is obliged to do,

where the record goes down a second time to have the case retried by a jury." This analogy would be in accordance with the ruling in the above case; for, where a defendant takes a cause down for trial by proviso he is bound to give a notice of trial, or the cause cannot be tried on his writ. 2 Tidd, 9th edit. pp. 761, 763.

G.



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*Wednesday,
January 26th.*

A corporation aggregate may be guilty of a misdemeanor by nonfeasance.

And in such a case an indictment is maintainable against it in its corporate name.

The QUEEN *v.* The BIRMINGHAM and GLOUCESTER
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DEMURRER to an indictment. The bill of indictment was preferred and found at the Worcester assizes, and removed by certiorari into this Court. The Company demurred by attorney.

The indictment was for the disobedience of an order of two justices on the Company, which had been confirmed, on appeal, by the Court of Quarter Sessions for the county of Worcester. The order, which was founded on the provisions by the Company's act, commanded certain arches and culverts to be made by the Company for the benefit of the prosecutors. There was a second count varying the terms of the charge against the defendants. The defendants were indicted by their corporate name.

Whateley in support of the demurrer^(a). An indictment will not lie against a corporation. No instance is known of such an indictment; it is a very strong argument that such an indictment is not known to the law, that in the regular tribunals of criminal jurisdiction there is no machinery by which a corporation can appear and plead to an indictment. In this very case, on the finding of this bill, the defendants not having pleaded, nor knowing how to plead, were distrained upon by the sheriff. On application to the judge, *Parke*, B., his lordship said there were no means by which the defendants could plead at the assizes. It is no answer to say that, by the course now adopted, a plea can be put in; if by the common law an indictment was sustainable, all the analogies of criminal procedure shew that the defendants would have been enabled to plead in the county where the indictment originated. But, sup-

(a) Before *Patteson*, *Coleridge* and *Wightman* Js.

posing this difficulty overcome, and the indictment to proceed, and a verdict of guilty found, how is a corporation to be punished? For, if a fine be imposed, the proper form of judgment is the condemnation to the fine, and then an award of apprehension to answer it; that is the constant practice on indictments for misdemeanors, and then the defendant is apprehended at once. The form of a judgment in *Tremaine's Entries*, 204, is so. A corporation might have no property.

Lord Coke says in the case of *Sutton's Hospital*(a), "a corporate aggregate of many is invisible, immortal, and rests only in intendment and contemplation of law." They cannot commit treason, nor be outlawed, nor excommunicated, for they have no souls; neither can they appear in person, but by attorney; accordingly in *Com. Dig. tit. Franchise* (F.), 39, it is said, "process of outlawry does not lie against a corporation aggregate; and therefore trespass does not lie against a corporation, but against the particular persons only; for a *capias* and *exigent* do not go against a corporation." There is an anonymous case in 12 *Mod.* 559, to the same effect, "note by *Holt*, C. J.; a corporation is not indictable, but the particular members of it are."

There are several cases which will be cited on the other side, but which on examination will appear not to be authorities. There is a form in 3 *Chit. Criminal Law*, 600, of an indictment against the assignees of a corporation; but that is in form against a corporation, and also against certain individuals by name, and it would be good against them, if bad against the corporation. In *Rex v. Mayor, Aldermen, &c. of Liverpool*(b), and *Rex v. Mayor, &c. of Stratford-upon-Avon*(c), there were indictments against corporations, but in neither was the objection taken; and they might be distinguishable on the ground that officers and members of the corporation were mentioned; the sheriff might have found out who were the mayor and aldermen,

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(a) 10 Co. 32b.

(b) 3 East, 86.

(c) 14 East, 348.

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and take them in satisfaction. There is a MS.(a) note in the Crown-office as follows:—"Hilary term, 1778, *Rex v. Owners and Occupiers of a parcel of ground called Bourne, in the Parish of Easingwold*, for not repairing a highway. Motion to quash the indictment because no particular person is named. A rule nisi was granted, and in the following Easter term the rule was made absolute without opposition;" to which this note is appended:—"It appears therefore that an indictment of a road repairable *ratione tenuræ* ought to mention the names of the persons bound to repair, and not to run generally against the owners, &c. as if it was against the inhabitants of a district." A corporation may be under many public obligations, but this is not the way to enforce them; particular members of the corporation should be included in the indictment.

The clause, enabling the Company to sue and be sued by one of their officers, applies only to civil proceedings. [*Patteson, J.* That clause was quite unnecessary, as they are incorporated.]

It is laid down that trespass will not lie against a corporation, but it is unnecessary to go that length on the present argument.

It was said on a former occasion(b) that, though an indictment might not lie against a corporation for a misfeasance, it would for a nonfeasance; but it is submitted that the position ought rather to be the other way, for a corporation might under their seal authorise the commission of a trespass(c); but for a nonfeasance, which is a contempt of the Court, each individual member is liable, for each is bound to do the act.

Talfourd Serjt. in support of the indictment. A corporation aggregate is liable to an indictment for a nonfeasance.

(a) By the late Mr. Dealtry.

(b) On a motion to quash the indictment, see the case, 1 G. & D. 457.

(c) *Vide* Com. Dig. Franchise

(F) 13. A corporation aggregate "cannot be a disseisor or trespasser without an agreement by deed."

The precedents are uniform, and this is the first time that proposition has been denied. The case in 12 *Mod.* is made the subject of remark in a very learned and accurate book, *Kyd on Corporations*, 225. "It seems that, where a corporation is bound to keep a bridge or a highway in repair, an indictment will lie against it for not repairing it. It is indeed reported to have been said by Lord Chief Justice *Holt*, that 'a corporation is not indictable, but the particular members of it are;' but I apprehend that can apply only to the case of a crime or misdemeanor; and that an indictment may lie against a corporation in the cases mentioned as well as against a county or parish."

It can scarcely be now said that trespass is not maintainable. It was distinctly decided in *Lord Yarborough v. The Bank of England* (a) that trover will lie, and if trover why not trespass? Lord *Ellenborough* considered the question in that case to be, whether a corporation "can be guilty of a trespass or a tort," and decided that they can. And his lordship, alluding to the 44 *Edw. 3*, 2 pl. 5, where an objection was taken, that trespass would not lie, observed "that the objection did not appear to have prevailed." That learned judge also adverts to a series of authorities, in which it appears to have been admitted that a corporation might be "disseisors or trespassers." If an indictment would not lie for an act authorised by the Company, there would be a failure of justice. For example, if there were an unlawful entry to take land, an action against the mere labourers who entered would be a very inadequate remedy. And, if the act were authorised by the corporation, individual members of it would not be liable for it; *Harman v. Tappenden* (b); at least unless there were express malice or interference by them.

An argument is founded on the assumed difficulty of a corporation pleading at assizes or sessions to an indictment. It is submitted that no such difficulty exists. A corporation

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(a) 16 East, 6.

(b) 1 East, 555.

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might make an attorney under seal, who might appear and plead for them. But, even if it be true that the only mode is to remove the indictment into this Court by certiorari, that does not warrant the argument founded on it. The case of *Rex v. Inhabitants of Clifton* (a) is a distinct authority that it is no objection to an indictment lying, that it is the only mode of proceeding. Where there is an indictment against a peer, not for a felony or breach of the peace, no process of outlawry lies against him, nor can a capias issue, the only mode of proceeding is by distringas, and distress infinite, or in some cases by sequestration. The difficulty suggested has been felt and overcome. In suits in equity against corporations an attachment does not lie, but a sequestration may issue; *Vin. Abr. B. 2, pl. 2(b)*.

The objection founded on the difficulty of awarding punishment would apply equally to proceeding by mandamus. An attachment would not lie against a corporation, *Men of Guilford v. Mills* (c); but still the mandamus goes against it, and it would be liable to an action for a false return. In cases of indictment against counties or parishes, all the parties cannot be brought before the Court to receive punishment. [*Coleridge J.* All are indicted, some may be taken.] It seems one or more of those liable may be indicted (d). If a corporation have no property to proceed against, perhaps the corporation might be reached by the course suggested in *Rex v. Thursfield and another* (e). There the defendants were cited in the Spiritual Court by their names of baptism, with the addition of master and wardens of a company. They moved for a prohibition, on the ground that they ought to have been sued in their "politic capacity only;" but the Court said there was no other way, for "if the Company had neither lands nor goods there was no way to make them appear; but here they said

(a) 5 T. R. 505.

(b) And see *Rex v. Dr. Windham*, Cowp. 377.

(c) 2 Keble, 1.

(d) 1 Hawk. P. C. b. 1, c. 32,

s. 3, by Curwood.

(e) Skin. 27.

they were cited by their proper names, but in their politic capacity, but if they stood out they might be laid by the heels in their natural capacity." However this may be, that the remedy is defective is no argument against the indictment lying.

The precedents are uniform that an indictment will lie. [Coleridge J. It seems to have been taken for granted in *Rex v. The Severn and Wye Railway (a)*.] All the judges in that case treated it as clear law that an indictment would lie. There are many precedents of such indictments; *Rex v. Mayor and Aldermen, &c. of Carlisle (b)*; *Rex v. Corporation of Gloucester (c)*; *Rex v. Dean of Christchurch and the Corporation of Oxford (d)*; *Rex v. Corporation of Newcastle upon Tyne (e)*. In the case of *Rex v. Corporation of Stratford upon Avon (f)*, an indictment for non-repair of a bridge, many points were discussed, but it was not objected that an indictment was not sustainable.

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Whately replied. It is admitted an indictment will not lie for a misdemeanour: this is a misdemeanour. In precedents cited where the mayor, aldermen, &c. were sued they might have been made personally answerable.

Cur. adv. vult.

PATTERSON J. delivered the judgment of the Court(*g*).—This was an indictment against a railway company by their corporate name for refusing and neglecting to make an arch and certain other works, pursuant to an order of justices made under the authority of the railway act.

The indictment was found at the quarter sessions, and removed into this Court by certiorari, when the Company

(a) 2 B. & Ald. 646.

(d) 3 Ch. Cr. L. 603.

(b) 4 Wentw. Plea. 157; 3 Ch. Cr. L. 587.

(e) Ibid.

(c) *Dogherty's Crown Ct. Assistant*, 398; 9th edit. 355.

(f) 14 East, 348.

(g) In Trinity Term, May 28.

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appeared and demurred generally, upon the ground that an indictment would not lie against a corporation.

Upon the argument it was not contended on the part of the Company that an action of trespass might not be maintained against a corporation; for, notwithstanding some dicta to the contrary in the older cases, it may be taken for settled law since the case of *Yarborough v. The Bank of England*(a), in which the cases were reviewed, that both trover and trespass are maintainable, but it was said that an indictment will not lie against a corporation. Only one direct authority was cited for this position, and it is a dictum of Lord *Holt* in an anonymous case reported in 12 *Mod.* 559. The report itself is as follows:—"Note, per *Holt*, Chief Justice—A corporation is not indictable, but the particular members of it are." What the nature of the offence was to which the observation was intended to apply does not appear, and as a general proposition it is opposed to a number of cases which shew that a corporation may be indicted for breach of a duty imposed upon it by law; though not for a felony or for crimes involving personal violence, as for riots or assaults(b).

A corporation aggregate may be liable by prescription, and compelled to repair a highway or bridge(c); and, in the case of *Rex v. The Mayor, &c. of Liverpool*(d), the corporation were indicted by their corporate name for non-repair of a highway; and upon argument in this Court the indictment was held to be defective, but no question was made as to the liability of a corporation to be indicted.

In the case of *Rex v. The Mayor, &c. of Stratford-upon-Avon*(e), the corporation was indicted by its corporate name for non-repair of a bridge, and found guilty; and upon argument in this Court the verdict was sustained, and no question made as to the liability generally of a cor-

(a) 16 East, 6.

c. 77, s. 2.

(b) Hawk. P.C. b.1, c. 65, s. 13.

(d) 3 East, 16.

(c) Hawk. P.C. b. 1, c. 76, s. 8;

(e) 14 East, 348.

poration to an indictment for breach of a duty cast upon it by law.

Upon the discussion of the question in the present case, the counsel for the Company relied chiefly upon the circumstance of the indictment being found at the assises, where the Company could not appear and take their trial, even if so disposed, as a corporation can only appear by attorney, and the appearance at the assises must be in person.

We think there is no weight in this objection. It may indeed impose some difficulty upon the prosecutor, and render his proceeding more circuitous, as he will be obliged to remove the indictment by certiorari into this Court in order to make it effective, but the liability of the corporation is not affected.

In the case of *Rex v. Gardner* (a) it was objected that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible; but the Court considered the objection of no weight, though it might be that there would be some difficulty in enforcing the remedy.

The proper mode of proceeding against a corporation to enforce the remedy by indictment is by distress infinite to compel appearance after removal by certiorari, as suggested by Mr. Baron *Parke* in this very case, as reported in 9 *Car. & Payne*, 469, and as appears by 2 *Hawk.* c. 27, s. 14, and the cases cited in *Vin. Abr.* tit. Corporations, B. a.

We are therefore of opinion, that upon this demurrer there must be judgment for the crown.

G.

Judgment for the crown.

(a) Cowp. 84.



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Where a ship was chartered by agreement not under seal (b) for a voyage from a foreign port to a port in England to load at the foreign port a cargo, and deliver the same on being paid a specified freight, half in cash and half in bills, and a bill of lading was signed to deliver goods to the charterer or his assigns, he or they paying freight for the same as per charter-party :—*Held*, that an acceptance under the bill of lading of the goods by an assignee of it did not raise an inference in law of a contract by him to pay freight. *Dict.* Notwithstanding the charter-party such acceptance would be evidence to a jury of a contract to pay freight. *Quere*, whether indebitatus assumpsit for freight is the proper form of declaring on such an implied contract.

SPECIAL verdict. *Indebitatus assumpsit* “for freight and primage, payable by the defendant to the plaintiffs for the carriage and conveyance of certain goods in and on board a certain ship or vessel of the plaintiffs from and to divers places at the defendant’s request;” for the price and value of certain work and labour then done and performed by the plaintiffs for the defendant at his request; for the use of a ship or vessel of the plaintiffs retained and kept on demurrage for a long time then elapsed at the defendant’s request; for money paid, laid out and expended by the plaintiffs, to and for the use of the defendant at his request, and upon an account stated.

Plea, non assumpsit.

The special verdict was as follows:—“That the plaintiffs were on the 19th December, 1835, the owners of a certain brig called the *Oscar*, and that Mr. *George Bell* then carried on business in London under the firm and style of *George Bell & Co.*, having a correspondent and agent at Ibrail carrying on business under the firm of *Bell and Anderson*, and on that day entered into the following memorandum of charter-party with *George Bell & Co.*:—

“*Memorandum for Charter.*

London, 19 Dec. 1835.

“It is this day mutually agreed between *Samuel Cockniss* and the owners of the good ship or vessel called the *Oscar*, of the measurement of 234 tons or thereabouts, now at Torquay, and Messrs. *George Bell & Co.* of London, merchants, that the said ship being right, staunch and strong, and every way fitted for the voyage, shall, after delivery of

(a) Decided in T. T. (May 27, 1841.)

(b) So stated in the special verdict; the judgment of the Court assumes that the charter-party was under seal.

her outward cargo at Constantinople, with all convenient speed sail and proceed to Ibrail in the river Danube, or so near thereto as she may safely get, and there load from the factors of the said charterers a full and complete cargo of such general goods and merchandize as may be sent alongside of the vessel, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions and furniture; and being so loaded shall therewith proceed to London, Liverpool or Bristol, calling at Cork or Falmouth for orders, or so near thereunto as she may safely get, and deliver the same on being paid freight at the rate of

60s. per ton for tallow.		
£11	„	unpressed wool.
£7	„	pressed wool.
£40 per mille for pipe staves.		
60s. load wainscot or square oak logs.		

} With 5 per cent.
primage.

“ Other goods, if any, proportionably.

“ Restraint of princes and ruler, the act of God, the king's enemies, fire, and all and every other danger and accidents of the seas, rivers and navigation, of whatever nature and kind soever, during the said voyage always excepted. The freight to be paid on unloading and right delivery of the cargo, half in cash and half by bills on London at three months' date; fifty running days are to be allowed the said merchant, if the ship is not sooner despatched, for loading the same ship at Ibrail and unloading at her port of delivery, to commence from the time the vessel is ready to take in, whether in quarantine or not, and ten days on demurrage over and above the said laying days at 5*l.* per day; penalty for non-performance of this agreement 1000*l.* The quantity of staves not to exceed three mille, and that of the logs 120 load, and, if the vessel requires to be lightened in passing the bar, the lighterage to be at the charterers' expense.


“ *George Bell & Co.*”

The ship sailed on her voyage to Ibrail, where she safel

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arrived, and received on board there the goods mentioned in the following bills of lading, which were signed by the captain, and forwarded by the said correspondents and agents of *Bell & Co.* from Ibrail to the said *George Bell & Co.* in London; the bills of lading, bearing date respectively the 3d, 6th, 25th and 26th August, 1836, were in the following form:—

“Shipped in good order and well conditioned by *Bell and Anderson* in and upon the good ship called the *Oscar*, whereof is master for the present voyage *William Field*, and now riding at anchor in the river Danube, and bound for London; to say,

G B
 A + 201 a 231. Thirty bales of unwashed Zigai wool.

G B
 A 41 a 55. Fifteen bales ditto ditto.

being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature or kind soever, save risk of boats as far as ships are liable thereto, excepted, unto Messrs. *George Bell & Co.* or their assigns, *he or they paying freight for the said goods as per charter-party*, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date, the one of which three bills being accomplished, the other two to stand void. Dated in the port of Ibrail, 3d August, 1836. Indorsed, *George Bell & Co.*”

That on the 16th July 1836, the following contract was made and entered into between *George Bell & Co.* and the defendant, by *W. G. Colchester*, the agent of Messrs. *George Bell & Co.* Messrs. *George Bell & Co.* had previously purchased the wools hereafter mentioned according to the recitals in the following contract:—

"London, 16th July, 1836.

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"Whereas by a contract made on the 4th January last between Messrs. *Bell* and *Anderson*, of Bucharest, on the one part, and Messrs. *Jacob N. Gallanter* and *Schonfield*, of Bucharest, and Messrs. *Leigh, Reiss & Co.*, of Sassy, on the other part, Messrs. *Bell* and *Anderson* purchased a quantity of wool, to be delivered at Ibrail or Galatz before the 1st of October next, a copy of which contract is hereto annexed: And whereas the said wool was bought for and on account of Messrs. *George Bell & Co.* of this city, and is at their entire disposition: Now be it known that I have this day sold for Messrs. *George Bell & Co.* to *Francis Ignatius Vanzeller, Esq.* the 200,000 okes of the washed Zigai wool, specified in the annexed copy, for the sum of 22,000*l.* The wool is to be put on board the ship by the sellers or their agents at the ports of Ibrail or Galatz, or any other port on the Danube, as the same may be delivered; and the buyer agrees to perform and fulfil all charter-parties and agreements for freight for the said wool heretofore made or to be made by the sellers, excepting any charges that may be made for demurrage, for which the buyer is in no case to be liable to pay. And the sellers are immediately upon the receipt of the bills of lading for the said wool to hand the same over to the buyer properly signed, it being understood that the 200,000 okes of washed wool, delivered by the before mentioned parties to Messrs. *Bell* and *Anderson* under the said contract, vest absolutely from this day in the buyers. And, whereas by a subsequent agreement Messrs. *Bell* and *Anderson* are to take a portion of wool in an unwashed state, according to a certain rule, in lieu of a part of the wool agreed to be delivered washed under the before mentioned contract, it is agreed between the said Messrs. *George Bell & Co.* and *Francis Ignatius Vanzeller, Esq.*, that the wool shall be delivered and received by them upon the conditions of the said contract and the subsequent agreement. And whereas the buyer has already paid to the sellers the sum

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of 9000*l.* on account of this purchase, the remainder of this purchase-money is to be paid in manner following, viz.:—The sum of 3500*l.* by the buyer's acceptance of the sellers' draft at two months from this date, 3500*l.* by a like acceptance at three months, and 4000*l.* by a like acceptance at four months from this date, and 2000*l.* to be paid in cash at such time or times as the sellers may require the same, they giving the buye ten days previous a notice in writing.

W. G. Colchester."

That the defendant under the said contract of the 16th July paid to *George Bell & Co.* in London for the said wools, and made his advances thereon before the arrival of the ship and cargo in this country. The bills of lading were indorsed and delivered by *George Bell & Co.* to the defendant; that 100 bales of wool were shipped by the said Messrs. *Bell* and *Anderson* on board a ship called the *Ann*, as and for part of the said 200,000 okes of wool so contracted to be sold as aforesaid, which said ship arrived in the port of London on the 27th day of October, 1836; and that, on the arrival of the said ship called the *Ann*, the said 100 bales were found to be and they in fact were wool of a quality other than and different from and very inferior to the quality of the said wool so contracted to be sold to the said defendant. That thereupon, and before the arrival in the port of London of the *Oscar*, the said defendant gave notice to the said Messrs. *Bell* and *Anderson* that he would not accept the said wool so arrived by the ship called the *Ann*, or the further parcel about to arrive by the *Oscar*, as and for wool so contracted to be sold to him as aforesaid; but that he the said defendant would receive the same, and sell and dispose thereof for and on account of the said Messrs. *George Bell & Co.*, and pay himself out of the proceeds the advances he had made on the goods. That the said Messrs. *George Bell & Co.* thereupon and before the said arrival of the *Oscar* agreed with the said defendant that he should receive the said wool by the *Ann* and

the Oscar, and sell and dispose of the same for and on account of the said Messrs. *George Bell & Co.*, and carry the proceeds to their credit against the sums so paid and advances made by the said defendant. The said Messrs. *George Bell & Co.* afterwards paid the freight for the said 100 bales of wool which had, as before mentioned, arrived by the Ann.

That the said several bills of lading of the said wool so shipped on board the Oscar arrived before the said ship arrived, and were indorsed and handed over to the defendant, some on the 29th of August and the residue on the 14th September, 1836. The defendant, before the arrival of the wools, sold part of them on the 8th November, 1836. The ship Oscar arrived in St. Katherine's Docks on the 21st November, 1836. That the wools were entered in the defendant's name by his order at the custom-house in London, and the duties for the same paid by the defendant; they were also entered at the St. Katherine's Docks in the defendant's name. The wools were landed from the ship Oscar on to the St. Katherine's Docks, and were of the same inferior quality as that which had been landed from the Ann. On the 22d November, 1836, the following order, signed by the defendant, was delivered by the defendant or his agent to the St. Katherine's Dock Company:—

“Please to allow the bearer to draw two samples.

For *Cooper and Spratt.*

London, Nov. 22, 1836.

J. Bentley.

To the Superintendent of the St. Katherine's Dock.

Please deliver to Messrs. *Cooper and Spratt* the under-mentioned wools entered by us ex. Oscar. *Field, Ibrail.*

Marks, &c.

Two hundred and ninety-nine bales of sheep's wool, they pay all charges.

F. I. Vanzeller.

Indorsed—Deliver the within to our carts. Charges to deposit account.

Your obedient servants,

Cooper and Spratt.”

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And the said wools were accordingly under that order then delivered to Messrs. *Cooper* and *Spratt*, and removed thence by them to certain warehouses on the defendant's account, and on the 30th November, 1836, he sold the residue of the wools by public auction on the account of *Geo. Bell & Co.*, as had been agreed upon between Mr. *Bell* and the defendant as aforesaid. *That the defendant obtained possession of the wools under the bills of lading, and the indorsement and delivery thereof to the defendant* as aforesaid; and payment of the freight according to the memorandum of charter, and now sought to be recovered in this action for the said wools assigned to the defendant under the said four bills of lading, was demanded by the plaintiffs of the defendant, and refused to be paid by him before this action was brought.

There were other wool and other goods on board the *Oscar* shipped by *Bell* and *Anderson*, consigned in a similar way to *George Bell & Co.* or their order, the bills of lading whereof, precisely similar in tenor and effect as those endorsed to the defendant, had been indorsed and delivered by them to Messrs. *Halford* for securing advances made by them to *Bell & Co.* There were also other goods on board the *Oscar* shipped by *Bell* and *Anderson*, and consigned to Messrs. *Halford* or their order, the bills of lading whereof were precisely similar in tenor and effect to those indorsed to the defendant. The said last-mentioned goods were consigned to Messrs. *Halford & Co.* for securing advances made by them to Messrs. *George Bell & Co.*

The plaintiffs by their broker, after the said wool had been so as aforesaid delivered to the defendant, and removed to the warehouses as before mentioned, namely, on the 6th December, 1836, gave notice to the St. Katharine's Dock Company to detain the cargo then in the docks for the whole of the freight payable under the charter-party. The goods so deliverable to Messrs. *Halford* were at the time the said notice was given in the warehouses of the said dock company, and were detained by the said company pursuant to the said notice; and in order to obtain posses-

sion thereof Messrs. *Halford* paid the freight of their own goods, and indemnified the company against the claims of the plaintiffs for further freight against them. Messrs. *Halford's* goods realized, after payment of their freight, 558*l.*, and the demand of the plaintiffs in this action for freight of the defendant's wool is 520*l.* 6*s.* The sums received by the defendant on the sale of the said wools are insufficient to cover his said advances on them, and there is still a large balance due to the defendant on his said advances upon the wool. That the plaintiffs are entitled to receive interest, if the plaintiffs are entitled to the judgment of the Court. But whether or not upon the whole matter aforesaid," &c. The damages were assessed conditionally at 520*l.*

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R. V. Richards for the defendant (a). The defendant is not liable to an action for the freight of the goods received by him. It is true that the verdict finds that the defendant obtained possession under the bill of lading, but all the facts found must be taken together, and they shew that the shipowner has no remedy against him. Where a bill of lading is made out generally, a buyer accepting goods under an assignment of such bill, is by the custom of merchants liable for freight; *Roberts v. Holt* (b). That liability, however, does not arise by force of an assignment of the contract between the shipper and shipowner, but by force of a new contract implied by law from the circumstances under which the acceptance of the goods has taken place; and it has been settled that no implication of such a new contract arises where a charter-party exists. Even in the case of a general ship, though the assignee may become liable on a new contract, the assignor is liable on the original contract; *Domett v. Beckford* (c). That case supports the authority of *Moorsom v. Kymer* (d), in which Lord *Ellenborough* denied the proposition "that whenever a party accepts the goods under a

(a) Friday, January 15, 1841,
 before Lord *Denman* C. J., *Little-*
dale, *Patteson*, and *Coleridge* Js.

(b) 3 Show. 443.
 (c) 2 N. & M. 374.
 (d) 2 Mau. & S. 303.

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bill of lading, the permitting him to take them shall raise an implied assumpsit on his part to pay the freight," and that case, expressly in point to this, decided that no promise ought to be inferred from such a fact alone. It is true in that case the charter-party was under seal, but that makes no difference. In that case Lord *Ellenborough* said, "The not exercising the lien might be either a voluntary recession from the party's right, or might be done upon a consideration; but I do not discover any particle of evidence to make it referable to the latter presumption." And *Le Blanc J.* said, "The rule is, that the law will not raise an implied promise where there is an express agreement between the parties. Then supposing the plaintiffs might have detained the goods until the specific freight was paid (and it is not pretended that they could have detained for more), or until the bills were given, if they have not insisted on that right, the law will not raise an undertaking between these parties where there is another remedy, and it is not necessary for the purposes of justice that it should be raised, but will remit the plaintiffs to their original contract." The bill of lading refers to the charter-party, the captain has notice, therefore, what the stipulated freight was, but there is nothing to inform the defendant of that fact, how then can the law infer a promise to pay that "specific freight?" Strictly speaking, that to which the plaintiffs are entitled is not freight, but a compensation agreed by the charter-party to be paid. The charter-party extends to the whole voyage, and how can the assignee become liable according to the bill of lading, that is to say, according to the charter-party, by which indeed, properly speaking, it is not freight that is due at all, but a compensation for the voyage? The principle of the decision in *Moorsom v. Kymer* is, that, where there is an express agreement for the payment of a "specific" sum for this compensation, the implication of a promise to pay freight by a party receiving the goods under a bill of lading does not arise. *Expressum facit cessare tacitum*. In *Dougal v. Kemble (a)* there was an accept-

(a) 3 Bing. 390; S. C. 11 Moore, 250.

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ance of goods under a general bill, and the indorsee of the bill of lading was held liable, but only on the ground that the holders of a bill of lading must be taken to know they were liable for freight, and it was said they need not make advances beyond the value of the goods subject to freight. That reasoning obviously does not apply to the case of a charter-party where the indorsee could not know the extent of obligation he would incur in order to obtain possession of the goods. *Coleman v. Lambert* (a) shews that, where there is no bill of lading, the consignee, if he be not the owner of the goods, is not liable simpliciter as consignee, except on a new contract to pay the freight. Of that new contract the Court said the bill of lading is in ordinary cases the evidence. *Moorsom v. Kymer* (b) was decided, but not reported, before *Bell v. Kymer* (c). In the latter case it does not appear that the point was made that the express contract prevented a contract being implied. In the report of the decision in banc, *Gibbs C. J.* is reported to have referred to *Moorsom v. Kymer*, evidently not then reported, as a decision against the defendant, whereas it was a decision in his favour that he was not liable. [*Patteson J.* There is another report of *Bell v. Kymer* in *Marshall* (d).] In the case of *Michenson v. Begbie* (e), it was held that the receipt of goods under a bill of lading will not make the consignee liable to all the conditions in it, even though expressly mentioned. *Scaife v. Tobin* (f) shews, as in *Cole-*

(a) 5 M. & W. 505.

(b) 2 Mau. & S. 303.

(c) 5 Taunt. 477.


(d) It there appears that *Shepherd*, on moving for the rule, did raise that point, but he does not appear to have pressed it as the principal objection, and he referred to *Moorsom v. Kymer*, then unreported, as an authority upon it. *Gibbs C. J.* does not appear to have alluded to that case at all, and to have considered it too clear for argument, that the case could

not be distinguished from *Cock v. Taylor*, 1 Marshall, 146.

The *Nisi Prius* decision of *Bell v. Kymer*, 3 Camp. 545, was cited in *Moorsom v. Kymer*, and was supported by *Bayley J.* on the ground that it was "as between the parties to the action, like *Cock v. Taylor*, as between them the ship was a general ship," and *Le Blanc J.* agrees in this view.

(e) 6 Bing. 190; *S. C.* 3 Moore & P. 442.

(f) 3 B. & Ad. 523.

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man v. Lambert, that the mere receipt by a consignee of goods on which the master had a lien, will not create any contract to pay the amount of it, though the consignee had notice; that in respect of which it arose, viz. a claim for a general average, not being mentioned in the bill of lading. *Tapley v. Martins (a)* and *Shepard v. De Bernales (b)*, shew no more than, that the introduction into the bills of lading of conditions upon the delivery was for the benefit of the shipowner; he may insist upon them if he pleases, and refuse to deliver unless they are satisfied, but if he do not he may still resort to the shipper.

But, even if the defendant could be liable by an implication of a contract from the facts found, it would not be on such a contract as is stated in the declaration, but on a special contract to observe the terms of the charter-party referred to, in consideration of the master waiving his right of lien.

Sir *W. W. Follett* contrà (c). The question is, whether a person can take possession of goods under a bill of lading in the form in which this is, without paying freight or making himself liable to pay it. It cannot be disputed that in general, if payment of general average or demurrage (d) be made conditions in a bill of lading, the acceptance of goods under it would raise a contract to pay them. The defendant when he took under the bill of lading had ample means of knowing what were the terms to which he became liable. A party so taking incurs not only a liability to pay freight, but for all other liabilities stated on the face of the bill of lading. [*Coleridge J.* Suppose a shipper expressly covenanted to pay.] That would make no difference, unless Mr. Justice *Bailey* (e) is right in supposing that the consignee is liable only where the consignor is not. But it is difficult to imagine any case in which the consignor is

(a) 8 T. R. 451.

(b) 13 East, 565.


(c) Tuesday, Jan. 19, 1841. The argument was adjourned on the former occasion, the Court desir-

ing to consider how far they were at liberty to draw inferences from the facts found by the verdict.

(d) *Jesson v. Solly*, 4 Taunt. 52.

(e) 2 Mau. & S. 318.

not liable for freight (a). In *Cock v. Taylor* (b), now the principal authority for the position that the acceptance of goods under a bill of lading raises a contract to pay the freight, no stress whatever was laid upon the fact that there was no charter-party between the shipper and the master. It was not said by either of the judges that the consignee was liable, because no one else was. Indeed *Domett v. Beckford* (c) has settled the question, if any doubt existed before, that the shipper's liability continues though the consignee may also be liable. And in *Jesson v. Solly* (d) it was held that the consignee was liable for demurrage under a bill of lading, in which it was expressly mentioned, and it cannot be said that no other person was liable for that. *Scaife v. Tobin* (e) supports that case. In *Wilson v. Kymer* (f) the master had proved for the freight under the bankruptcy of the shippers, and yet it was held he could proceed against the consignee. The cases are now all one way. *Artaza v. Smallpiece* (g) was over-ruled by *Cock v. Taylor* (b). In *Moorsom v. Kymer* (h) there was a charter party under seal, and that certainly may prevent an assumpsit

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(a) In *Drew v. Bird, M. & M. 156*, Lord Tenterden ruled at Nisi Prius, in accordance with that opinion of *Bailey J.*, but that authority is over-ruled by *Domett v. Beckford*, 2 N. & M. 374, on the ground that there was no distinction between the cases where there was a charter-party, and where none, for if the charter-party made it a condition to the delivery that freight should be paid, and the master, delivering without insisting on the conditions, could still sue the shipper, how could it be otherwise where the alleged condition was imposed only by the bill of lading, there being no charter-party? If there were no bill of lading the shipper would be liable, because the consignee clearly would not, *Scaife v. Tobin*, 3 B. & Ad.

526; and the argument to discharge the shipper, therefore, must be that the fact of there being a bill of lading authorizing the demand of freight from the consignee, which the master had neglected to make, would discharge an implied contract to pay freight; though it would not discharge an express contract to pay freight by a charter-party. In *Domett v. Beckford*, Parke J. cited *Shepard v. De Bernales*, 13 East, 565, to show that the latter point had been long decided.

(b) 13 East, 399.

(c) 2 N. & M. 374.


(d) 4 Taunt. 52.

(e) 3 B. & Ad. 523.

(f) 1 Mau. & S. 157.

(g) 1 Esp. N. P. C. 23.

(h) 2 Mau. & S. 318.

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from arising. *Schack v. Anthony* (a), in which this question was discussed, was decided on that ground. No difficulty is created by the charter-party here requiring part of the payment to be made in bills; if liable in indebitatus assumpsit for freight, the defendant would be liable, in a special action, to be called on to give bills, or, after the period to be covered by the bills had expired, indebitatus assumpsit would lie as for a money payment. But it is not necessary to argue here that a special assumpsit might be brought for the non-observance of particular terms in a charter-party by reference incorporated in a bill of lading, because here nothing is referred to but the "freight," the charter-party must be referred to, to ascertain what that "freight" is, and then the case is precisely the same as if the amount of the freight had been directly inserted in the bill of lading.

The mode of declaring adopted in this case is supported by too many authorities to be now questioned. The objection to it was made in *Dougul v. Kemble* (b), and then held to have been long overruled.


R. V. Richards. Wilson v. Kymer was said by *Bailey J.* in *Moorsom v. Kymer*, to have been "decided entirely on the usage."

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court.—Messrs. *Bell*, of London, chartered a vessel of plaintiffs by a memorandum, agreeing that she should proceed to the Danube and load for the factors of the charterers a cargo of general merchandise, to be delivered in England, "on being paid freight," at certain specific rates for tallow, various kinds of wool, and other merchandise; "the freight to be paid on unloading and right delivery of the cargo, half in cash and half by bills on London, at three months' date," with other stipulations, not material to our present inquiry.

(a) 1 Mau. & S. 574. (b) 3 Bing. 190; S. C. 3 Moore & P. 442.

The ship sailed and received a large quantity of wool with bills of lading addressed to Messrs. *Bell*, or their assigns, "he or they paying freight for the said goods as per charter-party, with primage and average accustomed."

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The agent of Messrs. *Bell* sold this wool to defendant for 22,000*l.*, "the wool to be put on board by the sellers or their agents, at Ibrail, or any other port in the Danube, as the same may be delivered," and the buyer agrees to perform and fulfil all charter-parties and agreements for freight for the said wool, heretofore made or to be made by the sellers, excepting any charge for demurrage, for which the buyer is in no case to pay, and the sellers are, immediately upon the receipt of the bills of lading, to hand the same over to the buyer properly assigned.

Defendant immediately paid Messrs. *Bell* for the said wool, which, on its arrival, was found to be of inferior quality, and he gave them notice that he would not accept it as the wool contracted for, but would sell it on account of Messrs. *Bell*, and pay himself his advances out of the proceeds. To this Messrs. *Bell* acceded. The wools were entered by defendant at the custom-house, and the duties paid by him in his own name, and he sold them, part by private contract, part by auction.

The special verdict finds that defendant obtained possession of the wools under the bills of lading, and that payment of the freight demanded by plaintiffs, first of Messrs. *Bell*, afterwards of defendant, was refused.


Some other goods brought by the same vessel to other merchants had paid freight to plaintiffs, but 520*l.* still remains due in respect of the wool.

The proceeds of the sales made by defendant as aforesaid are insufficient to pay the advances made by him, and a large balance is still due to him from Messrs. *Bell*.

In this case we had written a detailed judgment, observing on the cases cited on the argument, being principally *Moorson v. Kymer* (a) for defendant, *Cock v. Taylor* (b), *Wilson*

(a) 2 Mau. & S. 318.

(b) 13 East, 399.

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v. Kymer and others (a) for plaintiffs. That first named established that the indorsee's acceptance of goods under a bill of lading does not of itself constitute an agreement to pay freight, &c. according to the bill of lading, where the ship has been engaged by a charter-party under seal. And to this extent we fully coincide with that decision.

Neither do we in any degree impugn the cases quoted on the other side, which appear consistent with reason, and have been often recognised as authority. They prove that such an acceptance may be evidence (stronger or weaker, according to other circumstances) of a new contract to make the payments, stipulated by the bill of lading, between the shipowner and the indorsee, to whom the goods are delivered.

In the present case we find a charter-party under seal, and *Moorsom v. Kymer* (b) shews that this privity is not created by operation of law. But, though we find evidence of the new contract alluded to, we must not forget that we are dealing with a special verdict (c), which states and confines us to the facts found by the jury. We have no right to infer anything, however probable in appearance. One of the facts therefore that are essential to entitle plaintiffs is wanting, and our judgment must be for the defendant.

G.

Judgment for the defendants.

(a) 1 Mau. & S. 157.

(b) 2 Mau. & S. 318.

(c) Shortly after the delivery of the above judgment, a rule was obtained on behalf of the plaintiffs, (June 11th) to shew cause why a new trial should not be had between the parties, or why the facts found at the trial should not be stated in a special case for the opinion of the Court, with liberty to the Court to draw their inference from the facts, or why the special verdict should not be amended in such a way as to raise the question of law for the opinion of the Court.

On the discussion of the rule in Hil. Term, 1842, (January 27,) it was contended for the plaintiffs that they had consented to the statement of the special verdict, solely in order that the authorities bearing upon the question of law might be reviewed, and particularly the case of *Cock v. Taylor*, 13 East 399. *Monkhouse v. Hay*, 8 Price, 256; *Bird v. Appleton*, 1 East, 111; *Goodtitle v. Jones*, 7 T. R. 48, were cited, and at the sittings after term, (February 1), the rule was discharged.

D.

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ASSUMPSIT by the plaintiffs, as surviving partners, for money had and received, for interest, and on an account stated. Plea: non assumpsit.

The following facts were stated for the judgment of the Court, pursuant to the statute 3 & 4 Will. 4, c. 42.

(a) Decided during the term (Jan. 18).

On the 13th September, 1831, a bill of exchange in three parts was drawn on Messrs. B. & Co. at Calcutta, by J. S. at

Birmingham, and indorsed by the payee to the plaintiffs. They transmitted the set of bills to their brokers in London, who indorsed it to R., who indorsed to the defendants. On the 30th September the defendants sent the first of the set of bills to A. & Co. at Calcutta, with a letter instructing A. & Co. "to do the needful and advise them thereof." In October the defendants forwarded the second and third of the set. A. & Co. received all three of the set, and on the 21st of April, 1832, presented the set of bills for acceptance, which was refused. It was duly protested for non-acceptance, and the defendants were advised by a letter, dated 28th April, of the dishonour. The protest was sent with the letter, but the bill was not returned. A duplicate of this letter was received by the defendants 3d November, 1832, but the original with the protest was not received till the 18th April, 1833.

On the day the defendants received the duplicate letter they gave notice of the dishonour to R., who gave notice to the plaintiffs.

A. & Co. at Calcutta, on the maturity of the bill, presented it for payment to the drawee, and, payment having been refused, sent to the defendants a letter, dated 27th July, expressing their regret that the defendants had given them no discretion in holding the bill, with a view to its being speedily paid by the drawee, and adverted to a letter which they had written to the drawee, regretting the necessity they were under of returning the bill, and at the same time observing that they would lose no time in remitting any sums he might think proper to pay them.

A. & Co. did not return the bill.

On the 31st July, 1832, A. & Co. wrote to the defendants, requesting instructions as to their mode of dealing with drafts on the same drawee, and stating, as to this bill, that they had retained it, with the original of the protest, in the expectation of its being paid, and they forwarded the duplicate protest and the third bill of exchange. This letter inclosed a copy of a letter from the drawee, stating his expectation of speedy payment.

Both the letters of A. & Co., that of the 27th July and that of 31st July, were sent to the defendants by the same ship, and were received by the defendants on the 10th December following, and on that day they presented the third bill of exchange and duplicate protest to R., who paid the amount with interest, exchange and re-exchange, and also received in due course the same from the plaintiffs.

On the 31st December, 1832, the defendants wrote to A. & Co., advising them of the receipt of the amount of the bill from R.

On the 12th September, A. & Co. advised defendants that they had received the amount from the drawee. This advice reached the defendants 30th January, 1833; they advised R. of it, disclaiming for themselves any interest in it, and the same day also wrote to A. & Co. at Calcutta, disclaiming all right to the money received by them from the drawee.

A. & Co. became bankrupt on the 12th December, 1832.

Held, that A. & Co. were not the agents of the defendants in receiving the amount of the bill from the drawee.

Quere, whether, supposing the defendants to have received the amount of the bill twice, once themselves from the prior indorser, and once by their agent from the drawee, they were liable to the plaintiffs in an action for money had and received to their use.

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A bill of exchange, of which the following is a copy, drawn in triplicate or set of three parts, on the day it bears date, by Mr. *John Scott* upon Messrs. *Bruce, Shand & Co.*, was made payable to the order of Mrs. *Elizabeth Ketland*, for value received, and was by her indorsed to the plaintiffs, who are bankers in Birmingham, for value received by her from them.

“ £1000.

Birmingham, Sept. 13, 1831.

“ At ninety days' sight pay this my first of exchange (second and third of same tenor and date unpaid) to the order of Mrs. *Elizabeth Ketland*, 1000*l.* at exchange, as per indorsement, which place to the account of, gentlemen, your obedient humble servant,

John Scott.”

“ To Messrs. *Bruce, Shand & Co.*

Merchants, Calcutta.”

This set of bills was remitted by the plaintiffs to their London bankers, Messrs. *Hanbury & Co.*, and was by these latter indorsed and sold for account of the plaintiffs, in the usual course of business, to Mr. *N. M. Rothschild*, for 1000*l.*, which amount was duly carried to the credit of the plaintiffs' account with *Hanbury & Co.*

Mr. *N. M. Rothschild* afterwards, in the usual course of business, indorsed and sold the same bills to the defendants. The defendants, on the 30th September, 1831, sent out the first of the three bills of exchange to Messrs. *Alexander & Co.* of Calcutta, to obtain acceptance and payment thereof for them, and the following is a copy of the letters which inclosed the bills:

“ To Messrs. *Alexander & Co.* Calcutta.

“ London, 30th Sept. 1831.

“ Dear sirs,—We inclose the first of the two under-mentioned sets of bills, *with which we request you will do the needful on our Calcutta account* 1829, advising us thereof, viz. No. 99, dated Birmingham, 19th September, 1831, drawn by *John Scott* on Messrs. *Bruce, Shand & Co.* in favour of Mrs. *Elizabeth Ketland*, at ninety days' sight, for 1000*l.*, indorsed to *N. M. Rothschild. Esq.*, by him to us

and by us to you, at the exchange of 1s. 7½d. per sicca rupee, equal to rs. 12,229.49.

We remain,

" Inglis, Forbes & Co."

In October following, the defendants forwarded to Messrs. *Alexander & Co.* the second and third parts of the said bill. All the three bills were duly received by Messrs. *Alexander & Co.*, and on the 21st of April, 1832, the first of the set was presented for acceptance to Messrs. *Bruce, Shand & Co.*, and acceptance having been refused, the same was duly protested for non-acceptance, and the defendants were advised of the dishonour by a letter from Messrs. *Alexander & Co.*, of which the following is a copy, so far as relates to the said bill, *but the bill was not returned:*

" To Messrs. Inglis, Forbes & Co.

Mansion House Place, London.

" Calcutta, 28th April, 1832.

" Dear sirs,—We acknowledge your letters of the 30th September, 17th and 26th of October, 1831, giving cover to the under-mentioned bills of exchange, of which we have to report progress as follows, viz. No. 99, dated Birmingham, the 13th September, 1831, drawn by John Scott on Messrs. Bruce, Shand & Co. in favour of Mrs. Elizabeth Ketland, at ninety days' sight, for 1000l. sterling, and indorsed to us for sicca rupees 12,229.49, protested for non acceptance on the 21st instant, and protest handed you herewith.

We remain,

" Alexander & Co."

The duplicate of the last-mentioned letter was received by the defendants on the 3d November, 1832, but the original letter containing the protest was not received until the 18th April, 1833, and no protest was sent with this duplicate letter. The defendants, on the same day they received the duplicate letter, viz. on the 3d of November, 1832, gave notice of the dishonour of the bill to Mr. *Rothschild*, by whom it was indorsed to them, by a letter, of which the following is a copy:

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" To *N. M. Rothschild*, Esq.

New Court, St. Swithin's Lane.

" Mansion House Place, 3d Nov. 1832.

" Sir,—We beg to give you notice that we have this morning received the advice from Calcutta of the protest for non-acceptance, on the 21st April, 1832, of the bill negotiated by you to us, at 1s. 8d. per sicca rupee, on the 23d September, 1831, for sicca rupees 12,229.49, drawn by *John Scott* upon *Bruce, Shand & Co.* at Calcutta, dated Birmingham, the 13th September, 1831, payable at ninety days' sight to Mrs. *Elizabeth Ketland*, indorsed by Messrs. *Rotton* and *Schofields* to Messrs. *Hanbury & Co.*, by them to you and by you to us. We remain, &c.

" *Inglis, Forbes & Co.*"

On the same 3d November, 1832, Mr. *N. M. Rothschild* wrote and sent the following note to Messrs. *Hanbury & Co.* :

" Birmingham, 13th Sept. 1831.

" At ninety days' sight.

" Order, *E. Ketland*, for 1000*l.*, drawn by *John Scott* on *Bruce, Shand & Co.* of Calcutta, bought of Messrs. *Hanbury & Co.*, 20 September, 1831, at 19½*d.* per rupee."

" New Court, 3d Nov. 1832.

" Mr. *Rothschild* begs to inform Messrs. *Hanbury & Co.* that he has just received advice of the above mentioned bill having been protested for non-acceptance."

Messrs. *Alexander & Co.*, at the maturity of the bill, viz. on the 23d July, 1832, presented it for payment to Messrs. *Bruce, Shand & Co.*, on whom it was drawn, and, that firm having refused the payment, Messrs. *Alexander & Co.* protested the same for non-payment, and wrote to the defendants the letter of which the following is a copy:

" To Messrs. *Inglis, Forbes & Co.*, London.

" Calcutta, July 27th, 1832.

" Dear sirs,—Herewith we return, under protest for non-payment, *John Scott's* bill, No. 99, for 1000*l.*, on Messrs. *Bruce, Shand & Co.* We might have hesitated in doing this, under the hopes held out that the drawees would pay

a considerable portion of it, and perhaps the whole; but with reference to the several indorsements, and in case of disappointment, the fear of your imputing laches to us, we follow the strict course, no discretion being given in your favour of the 30th September last, which inclosed the bill.

"We think it right to give you a copy of our letter to Messrs. *Bruce, Shand & Co.*, and shall have great pleasure in remitting to you immediately whatever sums we may receive on this account.

"We annex memorandum of charges debited to your account upon said protested bill. We are, &c.

"*Alexander & Co.*"

"Memorandum of charges—

Protesting for non-acceptance in duplicate . . .	40	0	0
Ditto . . . non-payment on ditto . . .	40	0	0
Commission on the protest, 1/. per cent. . .	122	4	6
	<hr/>		
	£202	4	6"
	<hr/>		

The following is a copy of the letter of Messrs. *Alexander & Co.* to Messrs. *Bruce, Shand & Co.*, referred to in the preceding letter:

"To Messrs. *Bruce, Shand & Co.*, Calcutta.

"Calcutta, July 27th, 1832.

"Dear sirs,—Mr. *Strettel*, who noted for non-acceptance and non-payment *John Scott's* bill for 1000*l.* upon yourselves, states therein that you desire the bill may not be returned, as you will be able in a few days to pay a considerable portion of it, and perhaps the whole, but from the several indorsements, and having no instructions, and fearing that laches may be imputed to us as in other unexpected cases, we feel ourselves under the necessity of returning the bill and advising Messrs. *Inglis, Forbes & Co.* At the same time we shall lose no time in remitting them whatever sums you may think proper to pay, and which we shall be happy to receive on this account.

"We are, &c. *Alexander & Co.*"

Messrs. *Alexander* did not return the said bill to the

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defendants according to their intentions expressed in their said letter of the 27th July, 1832, but retained the same at Calcutta.

On the 31st of July, 1832, Messrs. *Alexander & Co.* wrote and sent the following letter to the defendants:

“To Messrs. *Inglis, Forbes & Co.*, London.

“Calcutta, July 31st, 1832.

“Dear sirs,—Since writing our letter of the 27th instant, we have received a communication from Messrs. *Bruce, Shand & Co.*, a copy of which we annex. We have every reliance on the bill being paid, and shall therefore retain it with the original of protest, forwarding you instead the duplicate and third of exchange, in case of disappointment; but we earnestly request you will in future favour us with instructions as to the manner in which you would have us treat these frequent drafts by *John Scott* on Messrs. *Bruce, Shand & Co.*, as well as with regard to similar bills, which are liable to notarial usage, though the payment ultimately is little doubtful in convenient time to the drawers.

“We are, &c. *Alexander & Co.*”

The following is a copy of a letter from Messrs. *Bruce, Shand & Co.* to Messrs. *Alexander*, and is the communication alluded to by Messrs. *Alexander* in their said letter to the defendants of the 31st July, 1832:

“To Messrs. *Alexander & Co.*, Calcutta.

“Calcutta, 30th July, 1832.

“Dear sirs,—In reply to your note of the 27th, we regret your determination to return the bill for 1000*l.*, drawn by *John Scott*, as we shall not be able to pay you anything unless the bill is here. We shall be able to pay in a month about 9000 rupees, and are in great hopes the remainder in a short time after. We are now getting the unsold property valued, and will let you know how much more we shall be able to pay; but unless the bill is here we cannot pay, and shall, in the event of your sending it back, have to make the remittance ourselves.

We are, &c.

“*Bruce, Shand & Co.*”

The duplicate protest and the third part of the said bill were inclosed in the said letter of the 31st July.

Both the said letters from Messrs. *Alexander & Co.* to the defendants, bearing date the 27th and 31st July respectively, were sent from Calcutta by the same ship, and were received by the defendants on the 10th of December following, and on that day they presented the third of exchange and the duplicate protest to Mr. *N. M. Rothschild*, who then paid them the amount with interest, exchange, re-exchange and charges. On the same 10th of December, Mr. *N. M. Rothschild* presented the same part of the bill and duplicate protest to Messrs. *Hanbury & Co.* and required payment thereof, and Messrs. *Hanbury & Co.* accordingly, on the same 10th December, paid on account of the plaintiffs, to Mr. *N. M. Rothschild*, 1000*l.* for the bill, and 273*l.* 17*s.* 7*d.* for interest, exchange, re-exchange and charges, accrued thereon.

On the 31st of December, 1832, the defendants wrote and sent to Messrs. *Alexander & Co.* a letter, from which the following is an extract:

" No. 220.

" 28th April, 1832.

" Acknowledging our Nos. 22, 24 and 25, of the 30th of September and 17th and 26th of October, 1831, inclosing bills on our Calcutta account. Advised that *John Scott's* on *Bruce, Shand & Co.* for sicca rupees 12,229.49, and Lieut. *Talbot's* draft on Messrs. *Macintosh & Co.* for sicca rupees 600, has been protested for non-acceptance,"

" Your No. 252.

" 27th July, 1832.

" Returned, accompanied by a protest for non-payment, the bill on Messrs. *Bruce, Shand & Co.* for 1000*l.* vi sicca rupees 12,229.49, remitted on our last Calcutta account, 1829, in our No. 33, of the 30th September, 1831, the equivalent of which has been paid to us by the indorsers."

Messrs. *Alexander & Co.* on the 12th September, 1832, wrote and sent to the defendants the following letter, advising them that *Bruce, Shand & Co.* had paid them the amount of the said bill on the 10th of the same month:

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"To Messrs. *Inglis, Forbes & Co.*, London.

"Calcutta, 12th Sept. 1832.

"Dear sirs,—In continuation of ours of the 31st of July last, we have now the pleasure to advise our having realized to credit of your 'Calcutta account, 1829,' on the 10th instant, the sum of sicca rupees 12,367.2, being the amount of *John Scott's* bill on Messrs. *Bruce, Shand & Co.* for 1000*l.* sterling, with interest and charges.

"We remain, &c.      *Alexander & Co.*"

This letter was received by the defendants on the 30th January, 1833, on the same day the defendants wrote to Mr. *Rothschild* a letter of which the following is a copy.

"To *N. M. Rothschild Esq.*, New Court.

"Mansion House Place, 30th January, 1833.

"We beg to acquaint you for the guidance of yourself and whomever it may concern, that we have received advice this day from Messrs. *Alexander & Co.* of Calcutta, under date the 12th September, 1832, of their having received on the 10th of that month, sicca rupees 12,367. 2, being the amount of *John Scott's* bill on Messrs. *Bruce, Shand & Co.* for 1000*l.* sterling, with interest and charges.

"As we received from you in due course the amount of this bill returned to us under protest for non-payment, we have no claim to the above sum of sicca rupees 12,367. 2, so irregularly paid to Messrs. *Alexander & Co.*, after the said bill had been returned under protest for non-payment.

"We remain, &c.      *Inglis, Forbes & Co.*"

The defendants on the same 30th of January wrote and sent to Messrs. *Alexander & Co.* the following answer to their said letter of the 12th September, 1832.

"To Messrs. *Alexander & Co.* Calcutta.

London, 30th January, 1833.

"Dear sirs.—We have this morning received your 269 of the 12th September, 1832, advising the receipt on the 10th of that month of the sum of sicca rupees 12,367. 2, being the amount of *John Scott's* bill on Messrs. *Bruce Shand & Co.* for 1000*l.* with interest and charges.

"Having on the receipt of the bill and protest for non-payment received from *N. M. Rothschild*, Esq. the indorser, the amount of the said bill and re-exchange, we have no claim for the amount so irregularly paid in Calcutta, after the bill had been returned under protest for non-payment, and we have acquainted Mr. *Rothschild* accordingly.

"We remain &c. *Inglis Forbes & Co.*"


Messrs. *Alexander & Co.* became bankrupts on the 12th of December, 1832.

The Court are to be at liberty to draw any inference that a jury should have drawn.

The question for the opinion of the Court is, whether, under the circumstances above set forth, the plaintiffs are or are not entitled to recover. If they are, judgment is to be entered for them for the sum of 1273*l.* 17*s.* 7*d.*, or for such other sum as the Court shall direct, together with interest thereon, if the Court should be of opinion that interest is recoverable. If they are not entitled to recover, final judgment is to be entered for the defendants.

Sir *F. Pollock* for the plaintiffs (*a*). First, the plaintiffs may recover from the defendants the money in dispute. It is not necessary to resort to *Alexander & Co.* Secondly, the plaintiffs are the proper parties to maintain this action. The letter of the 30th September, 1831, justified *Alexander & Co.* in holding the bill and receiving payment, if there were any prospect of payment; if not, the act of the agent in holding the bill and receiving the payment bound his principals the defendants. Can it be said on the other side, that the holder of a bill drawn on a particular person, and then dishonoured, can receive the amount from the drawee, and retain it, also receiving the amount from the indorser? If the holder gives due notice, he may keep the bill a reasonable time in the hopes of receiving payment from the drawee, and if that holder be the agent of another it is his duty to take that course. Any irregularity that took

(*a*) In *H. T.* 1841, (January *Littledale, Patteson, and Cole-ridge* Js. before Lord *Denman* C. J.

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place arose from the acts of the defendants themselves, who retained the bill to obtain payment, upon an expectation which had been held out that it would be paid. Whether the money received by *Alexander & Co.* is or is not to be considered as a payment to the defendants under the authority of their instructions to *A. & Co.*, or merely as money received by *A. & Co.* as agents of the defendants in respect of this bill, somebody must be entitled to recover it from the defendants; at all events they cannot keep it. The payment in London was a payment in ignorance of the fact that the bill had been paid in Calcutta. The defendants did every thing to enable their agents to do what they did. Suppose this had been an accepted bill, the agents could have sued upon it, if they had kept one part in India. A particular and special agent has no authority at all, except in strict pursuance of the instructions given, but any general agent having instructions in a particular manner is not so limited.

*R. V. Richards* contra. The case does not state that there was any course of dealing between these parties. *Alexander & Co.* must therefore be looked upon as agents to the defendants only so far as they received authority from their instructions. They were the foreign agents of the defendants for a particular purpose. Their own letter shews most strongly the interpretation they put upon their instructions; they regret they have not authority to endeavour to obtain a subsequent payment of the bill. The defendants, the very day they received notice of the payment to *Alexander & Co.* repudiated it. It is said the money was received in the course of agency, but that is assuming the whole question; the limited agency of *Alexander & Co.* had then expired. This is not a question whether a general agency has been limited, as it was in *Whitehead v. Tuckett* (a), it is a question of the amount of particular agency conferred by the letters of the defendants, and it lies upon the plaintiffs to bring the act of receiving the money within the

(a) 15 East, 41.

scope of that particular agency. But it was not within that scope, for the agency was created for a special purpose, viz., for the presentment of the bill to the drawee, and the receipt of the money in the regular course, and any general words made use of must be construed with reference to, and be restricted by, that special purpose. *Hay v. Goldsmith (a)*.

As to the other point, there was no privity between the plaintiffs and the defendants. It must be said on the other side, that there was a shifting right of action among all these indorsers as they took up their bill, to bring an action against the defendants to recover the amount received by them.

Sir *F. Pollock* replied.

*Cur. adv. vult.*

Lord DENMAN C. J. delivered the judgment of the Court. This was an action for money had and received. The plaintiffs were the holders of a bill of exchange in three parts, drawn on 13th Sept. 1831, by *John Scott*, at 90 days' sight, for 1000*l.* on Messrs. *Bruce and Shand* of Calcutta, in favour of Mrs. *Ketland* or order, who indorsed it to the plaintiffs. The plaintiffs, by their agents in London, Messrs. *Hanbury*, sold and indorsed it to Mr. *N. M. Rothschild*, who afterwards sold and indorsed it to the defendants. The defendants sent it to Calcutta to their agent *Alexander & Co.* directing them "to do the needful." On the 21st April, 1832, the bill was presented and acceptance refused; it was protested, and the protest forwarded to the defendants on the 28th April. A duplicate also was forwarded by another ship, which arrived first, viz. on the 3d Nov. 1832, on which day the defendants gave notice of dishonour to Mr. *Rothschild*, who on the same day gave notice to Messrs. *Hanbury*, the agents for the plaintiffs. The bill was presented again by *Alexander & Co.* for payment on the 23d July, 1832, and payment was refused, whereupon it was protested for non-payment, and a duplicate of the

(a) 2 Smith, 79.



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protest with the third part of the bill was forwarded to the defendants by letter of the 27th July, 1832, *Alexander & Co.* retaining the original protest and the other parts of the bill, in consequence of a letter from *Bruce & Shand*, the drawees, in which they expressed a confident expectation of soon being in funds to pay the bill, and of which *Alexander & Co.* informed the defendants by letter of the 31st of July, 1832. These two letters arrived together on the 10th Dec. 1832, on which day the defendants received from *Mr. Rothschild* the amount of the bill, re-exchange, interest and charges, who on the same day received the same amount from *Messrs. Hanbury*, as agents for the plaintiffs. On the 31st Dec. 1832, the defendants wrote to *Alexander & Co.* acknowledging the receipt of the bill and protest, and stating that they had received the amount from the indorsers. In the meantime, viz. on the 10th Sept. 1832, *Bruce and Shand* paid the amount to *Alexander & Co.* who by letter of the 12th Sept. informed the defendants of it. This letter arrived on the 30th Jan. 1833. The defendants immediately (on the same day) informed *Mr. Rothschild* of the receipt of the money by *Alexander & Co.*, disclaiming any right to it; and also on the same day wrote to *Alexander & Co.* to the same effect, treating the payment to them as wholly irregular. *Alexander & Co.* became bankrupts on the 12th Dec. 1832.

The first question is whether the receipt of the money by *Alexander & Co.* on the 10th Sept. is in law a receipt by the defendants; and, secondly, if it be, then as the defendants will have received the money twice, to whom are they to refund?

As to the first, it is clear that in this case *Alexander & Co.* had no discretionary powers confided to them as to the bill in question; they were to deal with it in the strict ordinary course of business. This is apparent by the letter of instructions, in which the bill was forwarded to them, and by their letters in which they regret being obliged to *return* the bill for want of discretionary or explicit instructions

what to do in case of dishonour, and request that in future they may have such instructions. They also communicate to *Bruce & Shand* their want of discretionary instructions, and the necessity they are under to return the bill in ordinary course. The defendants were undoubtedly informed by the letters of the 27th and 31st July from *Alexander & Co.* that they intended to receive whatever *Bruce & Shand* might think fit to pay. These letters arrived on the 10th December, on which day the defendants received the money from *Rothschild*, and they do not write to *Alexander & Co.* till the 31st December, when they state that they had received the equivalent from *Rothschild*, but do not in terms find fault with *Alexander & Co.* or state that they shall repudiate any receipt by them in the interim. But this is not sufficient to ratify such receipt, if it was in itself irregular and out of the ordinary course. If, therefore, the payment by *Bruce & Shand* to them on the 10th Sept. was not in the ordinary course of business, it cannot be considered as a payment to the defendants, and the matter must be settled between *Bruce & Shand* and *Alexander & Co.* Now *Bruce & Shand* were not debtors, for they had refused to accept the bill. Immediately upon that refusal a right of action against *Rothschild* and the prior parties vested in the defendants. The bill was very properly protested for non-acceptance and the protest sent to the defendants, and they gave notice forthwith to *Rothschild*. Therefore on the 3d Nov. 1832, their case was perfect against *Rothschild*, and they had no occasion to wait until the time for payment of the bill would have arrived, if it had been accepted; nor was it necessary for *Alexander & Co.* to keep the bill in order to present it for payment, nor do they in their letter of the 28th April intimate any intention so to present it. *Alexander & Co.* and *Bruce & Shand* must have contemplated that the defendants on receipt of the protest for non-acceptance would call upon *Rothschild*; much more must they have contemplated that they would do so on receipt of the protest for non-payment notwith-

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standing the intimation by *Alexander & Co.* in their letters of the 27th and 31st July, inclosing that protest, of what had passed between them and *Bruce & Shand*, and of their intention to take whatever *Bruce & Shand* might pay.

Under these circumstances the payment by *Bruce & Shand* being entirely voluntary must surely be taken to have been made subject to whatever might take place in England between the parties to the bill, especially as the expenses attending the dishonour and the re-exchange must necessarily be obtained by the defendants from *Rothschild* or the prior indorsers, for *Bruce & Shand* were not liable to any payment, and did not in truth pay or offer to pay those expenses and re-exchange. *Alexander & Co.* could not in the ordinary course of business tie up the hands of their principals (the defendants) from proceeding against the parties in England till it should be seen whether *Bruce & Shand* would voluntarily pay the bill, nor could *Bruce & Shand* suppose that by paying the bill on the 10th Sept. they could prevent such proceedings.

Whether or not the payment would have been regular if *Bruce & Shand* had accepted the bill when first presented to them, and had dishonoured it when presented for payment, it does not seem to be necessary to determine. But even in that case, inasmuch as an acceptor, having once dishonoured a bill, cannot afterwards make a valid tender, or insist on the holder taking the money, it should seem that the agent of the holder has no general authority to take it. Neither is this case at all analogous to a payment *supra protest*, for that usually, if not always, takes place immediately upon the dishonour, and at any rate, if it is proposed to be made afterwards, it is quite optional with the holder to take it or not.

For these reasons we think that this payment was not made to *Alexander & Co.* in the ordinary course of business, and cannot be treated as in law a payment to the defendants.

Then as the payment made to the defendants by *Roths-*

*child* was in the ordinary course of business, and as the defendants have received the amount of the bill but once, they are entitled to retain the money against all the world.

This being our view of the first point in the case, the second does not properly arise. All that we wish to say upon it is that, even if the defendants were to be considered as having received both payments, we are by no means prepared to hold that the present plaintiffs could treat one of them as money had and received to their use; certainly not the first payment, viz. that by *Bruce & Shand* on the 10th Sept. for, if that was a payment made to the defendants, it was rightfully made, and they would be entitled to retain that money. The other payment in England would also have been rightfully made so far as regards the expenses, interest, and re-exchange, but as to the principal sum the defendants would not be entitled to retain it. It would be an over-payment and must be refunded, but whether to *Rothschild* or to the present plaintiffs, in order to avoid circuity of action, may possibly admit of a doubt, though the present plaintiffs are themselves but intermediate indorsers, and for any thing that appears on this case may have received the money from Mrs. *Ketland*, and she from *Scott* the drawer, each of whom might therefore have actions successively, if this action were held maintainable.

Upon the whole we are of opinion that the plaintiffs are not entitled to recover, and that judgment must be entered for the defendants.

G.

Judgment for defendants.

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1842.

Thursday,  
January 27th.

A bill of indictment, venue "Borough of Stamford," was found at the quarter sessions of that borough. The indictment stated that the defendant *A.*, "of the parish of *M.*, in the county of *Northampton*, and within the borough of *Stamford*, constable, on &c. at the parish aforesaid, in the borough aforesaid, did" &c.

The defendants removed the indictment by certiorari; a venire was awarded into *Lincolnshire*, and the defendant was found guilty at the assizes for that county.

The borough of *S.* is partly in *Lincolnshire* and partly in *Northamptonshire*. The offence charged was committed in that part of the borough which is in *Northamptonshire*, within 500 yards of the *Lincolnshire* boundary. The borough of *Stamford*, in the Schedules to the Boundary and Municipal Corporation Acts, is classed as being in the county of *Lincoln*.

Held, as it appeared a *Lincolnshire* venire had been awarded to try an offence laid in *Northamptonshire*, that judgment must be arrested.

The QUEEN v. MITCHELL and another.

*WHITEHURST*, in Michaelmas term last, obtained a rule to shew cause why the verdict obtained by the prosecutor in this case, at the last *Lincolnshire* assizes, should not be set aside and a verdict entered for the defendants, or why a new trial should not be had on the ground of mistrial, or why the judgment should not be arrested.

A bill of indictment for assault had been found against the defendants at the quarter sessions, held in April last, for the borough of *Stamford*.

The indictment was in the following form:—

Borough of *Stamford*, } The jurors for our lady the Queen  
to wit. } upon their oath present that *Francis Mitchell*, late of the parish of *St. Martin* *Stamford* Baron, in the county of *Northampton*, and within the borough of *Stamford*, constable, and *John Blades*, late of the same parish, constable, on the 26th day of March, in the 4th year &c. with force and arms, at the parish aforesaid, in the borough aforesaid, in and upon &c. did make an assault, &c.

The defendants traversed the indictment to the next quarter sessions for the borough, and in the mean time removed the case by certiorari, and entered into the usual recognizances to appear, plead and try at the then next *Lincolnshire* assizes.

A venire was awarded to the sheriff of *Lincolnshire*, and the indictment was tried before *Parke B.* at the summer assizes for that county. At the commencement of the trial it was objected, on behalf of the defendants, that they could not be tried in *Lincolnshire* for an offence laid in *Northamptonshire*. The learned judge allowed the trial to proceed, giving the defendants leave to avail themselves of the

objection in such manner as this Court might think fit; and the defendants were found guilty.

The defendants were constables of the borough of Stamford under 5 & 6 *Will.* 4, c. 76, s. 76, and committed the assault in the course of apprehending the prosecutor. The borough of Stamford extends over part of the two counties of Lincoln and Northampton. The parish of St. Martiu is wholly in the county of Northampton; but by the Boundary Act (2 & 3 *Will.* 4, c. 64, sched. O.) and the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76, sched. A,) part of the parish is thrown into the borough, and the borough appears in the above-mentioned schedule of the former act under the head "County of Lincoln." The assault took place in that part of the parish which has been so thrown into the borough, and within 500 yards of the boundary between the two counties.

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*M. D. Hill* and *Miller* shewed cause. Even if there has been a mistrial, the rule is wrong in asking for a venire de novo, for the effect of such a venire would be that the case would be tried by a Lincolnshire jury again.

But there has been no mistrial. By the Boundary Act and the Municipal Corporation Act, the borough of Stamford has been placed in the county of Lincoln: the assault is charged to have been committed in the "borough aforesaid;" and what is stated in the indictment with respect to the parish is immaterial, and cannot prejudice.

Again, by 7 *Geo.* 4, c. 64, s. 20, no judgment on any indictment, whether after verdict or outlawry, or by confession, default or otherwise, shall be stayed or reversed for want of a proper or perfect venue, where the court shall appear by the indictment to have had jurisdiction over the offence. The case is also within sect. 12 of the same act, for the offence was committed within 500 yards of the county boundary. The defendants cannot insist on the privilege given to them, as borough constables, by 5 & 6 *Will.* 4, c. 76, s. 133, which provides "that all actions and

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prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, because to this and to other objections the general answer may be given that the defendants themselves, by removing the cause, have consented to the trial in Lincolnshire, and that they cannot take advantage of their own wrong.

If there is any defect in the proceedings, the Court will, under all the circumstances, enter a suggestion on the record that the trial was had in Lincolnshire by consent.

*Whitehurst and Waddington* contra. The consent of the defendants, if it could warrant the mistrial, does not appear. The defendants removed the indictment into this Court, as they were bound to do by their recognisances, and the venire into Lincolnshire is the act of the Court. The prosecutor need not have appeared in Lincolnshire; and, if the defendants had been acquitted in consequence of his non-attendance at a court which had no jurisdiction over the offence, they could not have pleaded autrefois acquit to another indictment properly framed. The 7 Geo. 4, c. 64, s. 20, does not apply, for it does not appear by the indictment that the court had jurisdiction, but the contrary; for the offence is stated in the indictment to have been in the parish of St. Martin, and that parish to be in the county of Northampton. Nor does the 12th sect. apply; for, though the offence was committed within 500 yards of the county of Lincoln, the venue to the indictment is the "Borough of Stamford;" and the section in question applies to counties only: *Rex v. Welsh* (a). With regard to the title under which the borough of Stamford is ranged in the schedule to the Boundary Act, this cannot be considered to have effected a transfer of a portion of the county of Northampton to the county of Lincoln.

(a) *Moody*, C. C. 175.

They referred to *Goodright d. Richards v. Williams* (a), *Ambrose v. Williams* (b), *Green v. Cole* (c), to shew that the objection was not cured, and that it was ground for arresting the judgment.

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**LORD DENMAN C.J.**—The Boundary Act is intituled an act to describe divisions of counties and boroughs “in so far as respects the election of members to serve in parliament,” and cannot have the effect of transferring one portion of a county to another for all purposes. The offence in this case is clearly stated to have been committed in Northamptonshire, for the reference to the borough does not exclude the reference to the parish, and the parish is stated to be in Northamptonshire. The venire therefore to the sheriff of Lincolnshire was wrong. The error has not been cured. As to the entering a suggestion, that cannot be done now, whatever might have been done before trial.

**PATTESON J.**—The 7 Geo. 4, c. 64, s. 12, where an offence has been committed within 500 yards of the county boundary, gives the prosecutor an option of laying *and* trying the offence in either county, but does not enable him to lay it in one county and to try it in another. The offence in this indictment is laid generally in Northamptonshire; nothing is said as to the offence having been committed within 500 yards of the Lincolnshire boundary, so that the Court which tried does not appear “by the indictment to have had jurisdiction.” Section 20 of the same act cannot cure the defect, for that section applies to wrong venue; here the venue is right; it is the venire that is wrong.

**COLBRIDGE and WIGHTMAN Js.** concurred.

**D.** Rule absolute to arrest the judgment.

(a) 2 Mau. & S. 270. (b) 11 East, 370. (c) 2 Saund. 258.



1842.

Tuesday,  
January 18th.

The lord of a manor on a grant of a copyhold tenement can neither add to nor diminish the ancient rent.

Where the lord of a manor, having a life interest only in the manor, granted, at a new rent of 2s., a portion of an entire tenement, the ancient rent for which entire tenement had been 10s. and two hens, the grant was held invalid against his successor.

*Quere* as to the right of the lord to sever the tenement, even if he had not varied the ancient rent.

DOE, on the several demises of R. RAYER the younger, W. ALLARD and T. ALLARD, and ELIZ. ELLIS LINDON, v. T. A. STRICKLAND, Clerk.

**EJECTMENT** to recover possession of premises in the parish of Bredon, Worcestershire. The declaration contained, 1. A demise by the said *Rayer* and the said *Allards*. 2. A demise by the said *Rayer*. 3. A demise by *W. Allard*. 4. By *T. Allard*. 5. By the said *Lindon*.

The defendant pleaded the general issue, and the cause was tried at the Worcester Spring Assizes, when a verdict was found for the lessors of the plaintiff, subject to the opinion of the Court upon the following case: (a)

The Rev. *John Keysall*, clerk, long before the year 1829, and until his death in 1836, was rector of Bredon, in the county of Worcester, and as such rector was lord of the manor of the rectory of Bredon, which extends over about 150 acres, and within it there were formerly twelve copyholds, which have now been reduced to seven or thereabouts.

The premises in question are part of those to which *Sarah Smith* was admitted tenant in reversion after the decease of *Eleanor Smith* by the copyhold grant of the 17th May, 1725, hereinafter mentioned; and the premises so granted to *Sarah Smith* were again granted together with other premises to *Rowland Bradstock*, *John Hunter* and *Paul Berrington* by the hereinafter mentioned copyhold grant of the 15th April, 1755, and the premises in question were by the renewed grant of the 23d September, 1762, hereinafter mentioned and made by *William Daven-*

(a) It has been found impracticable to compress the statements in the case within a more convenient compass, as the Court was put in the situation of a jury for the purpose of finding facts or drawing inferences; but the leading facts will be found succinctly

stated in the judgment of the Court. The statements in the case that relate to the dealing with the premises in question end with page 282; page 283 commences with the statements as to other tenements for the purpose of shewing the custom.

port, the then rector and lord of the manor, excepted and reserved to the lord out of the copyhold grant by the description of "the garden then in the occupation of the said *William Davenport*, and inclosed with a brick wall," being part of the tenement above mentioned, late *Eleanor Smith's*.

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It appears by the court rolls that the garden in question was in the year 1762 in the possession of *William Davenport*, then lord of the manor and rector, and by a living witness it was proved that the garden had been held by Mr. *Smith*, Mr. *Keysall*, and the present Mr. *Strickland*, successively rectors and lords of the manor, and has been during all that time used as the garden of the rectory house of the parish of Bredon, the same being a walled garden with hothouses.

The defendant is the present rector and lord of the manor, and, as such, came into and is in possession of the garden, and has used it as the garden of the rectory house.

The following entries appear on the court rolls of the said manor, and relate to the premises in question.

"17th May, 1725. Manor of the Rectory of Bredon, with its Members.

"*Sarah Smith*, spinster, daughter of *Eleanor Smith*, widow, took from the lord the reversion of one customary messuage, and half a virgate of land, with all lands, meadows, pastures and feedings, with the appurtenances in Bredon belonging to the same messuage, all of which premises were in the tenure of *Eleanor Smith*, and formerly were in the tenure of *Samuel Hill*, or his undertenants, and were parcel of the customary lands of the manor aforesaid, To hold to her the said *Sarah* after the death, surrender, or forfeiture of the said *Eleanor* for the term of her natural life, at the rent of *ten shillings and two hens yearly*, and all other customs and services, and a heriot according to the custom of the manor," &c.

"15th April, 1755. The Rev. *William Davenport*, the lord, granted to *Rowland Bradstock*, clerk, *John Hunter* and

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*Paul Berrington*, one messuage, ten acres of land, and one acre of meadow ground, with the appurtenances, then in the possession of *John Turbitt*, deceased, one other messuage, ten acres of land and one acre of meadow, with the appurtenances, late in the possession of *Eleanor Smith*, deceased, and five acres of land, more or less, and half an acre of meadow ground, with the appurtenances, late in the possession of — *Bartholomew*, widow, deceased, and which said two messuages, several parcels of land and premises, with the appurtenances, lately fell into the hands of the lord of the said manor, To hold to said *Rowland Bradstock*, *John Hunter* and *Paul Berrington*, for their lives and the life of the longer liver of them successively, at the will of the lord, according to the custom of the said manor, at the usual rents, that is to say, for *Turbitt's* 10s. and two hens, for *Smith's* 10s. and two hens, and for *Bartholomew's* 6s. and two hens, heriots and all other customary services."

There is also an entry that the names of the said grantees were used in trust for the said Rev. *William Davenport*, his executors, administrators and assigns.

On the 23d September, 1762, (at a Court Baron of the said *William Davenport*), *Rowland Bradstock*, *John Hunter* and *Paul Berrington*, three customary tenants of said manor, surrendered into the hands of the lord by the steward, according to the custom of the said manor, all the said several premises described in the grant of the 15th April, 1755, to the end that the lord might do his will therewith, whereupon the lord granted to the said *Rowland Bradstock*, *Paul Berrington* and *Samuel Drinkwater*, all and singular the premises aforesaid, *except and always reserved* to the lord of the said manor for the time being the garden then in the occupation of the said *William Davenport* and inclosed with a brick wall, being part of the said tenements above mentioned, late *Eleanor Smith's*, To hold unto the said *Rowland Bradstock*, *Paul Berrington* and *Samuel Drinkwater* for their lives, and the life of the

longer liver of them successively at the will of the lord, according to the custom of the said manor, paying to the said lord the usual rents, that is to say, for *Turbitt's* 10s. and two hens, for *Smith's* 10s. and two hens, and for *Bartholomew's* 6s. and two hens.

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And it was to be noted that the names of the said *Rowland*, *Paul* and *Samuel*, respectively, were used in that grant in trust only for the said *William Davenport*, his executors, administrators and assigns.

On the 20th January, 1775, (at a Court Baron held of the said *William Davenport*,) *Rowland Bradstock*, *Paul Ber- rington* and *Samuel Drinkwater* surrendered into the hands of the lord all the said several premises comprised in the two last-mentioned grants, to the end that the lord might do his will therewith, whereupon the lord granted to *John Bradstock*, son of the said *Rowland Bradstock*, *Barbara Davenport* and *Mary Davenport*, daughters of the said *William Davenport*, all the said several premises with the appurtenances, except and always reserved unto the said lord of the said manor for the time being the garden then in the occupation of the said *William Davenport*, and in- closed with a brick wall, being part of the said tenement above mentioned, and then late *Eleanor Smith's*, To hold, except as aforesaid, unto the said *John Bradstock*, *Bar- bara Davenport*, and *Mary Davenport* for their lives, and the life of the longer liver of them successively, at the will of the lord, according to the custom of the said manor, paying to the said lord the usual rents, that is to say, for *Turbitt's* 10s. and two hens, for *Smith's* 10s. and two hens, and for *Bartholomew's* 6s. and two hens. The said *John* was thereupon admitted tenant &c. until and so forth. And it was to be noted that the names of the said *John*, *Bar- bara*, and *Mary*, respectively, were used in that grant in trust only for the said *William Davenport*, his executors, administrators and assigns.

At a Court Baron, holden on the 30th July, 1813, of the Rev. *John Keysall*, rector of Bredon, the said lord granted

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to *Mary Ann Shakespear*, aged about twenty years, the reversion of the said premises then late in the possession of *Barbara Davenport*, except and always reserved unto the lord of the said manor the garden then in the possession of the said *John Keysall*, and inclosed with a brick wall, being theretofore part of the said tenements theretofore *Eleanor Smith's*, and also one cottage or tenement and garden, situate in the Church-street at Bredon aforesaid, and then in the occupation of — *Saunders*, widow, To hold &c. unto the said *Mary Ann Shakespear*, after the death, surrender or forfeiture of *John Bradstock*, for the term of her life, at the will of the lord, according to the custom of the said manor, paying yearly to the lord, when the reversion should happen, the usual rents, viz. for *Turbitt's* 10s. and two hens, and for *Bartholomew's* 6s. and two hens.

On the 23d of Sept. 1829, at a Court Baron of the said *John Keysall*, clerk, the said lord granted unto *Richard Rayer*, the younger, *William Allard* and *Thomas Allard*, they being named in trust for the aforesaid *John Keysall*, his executors, administrators and assigns, and to surrender, when by him or them they should respectively be thereunto required, all that piece or parcel of land or ground then and theretofore used as a garden, formerly in the possession of the said Rev. *Wm. Davenport*, LL.D., and then of the said *John Keysall*, being inclosed by a brick wall, &c., To hold unto the said grantees in trust as aforesaid, during their natural lives and the life of the longest liver of them successively, at the will of the lord according to the custom of the said manor, at and under the yearly rent of 2s., heriots and all other customs and services theretofore due and of right accustomed.

The property so granted as last aforesaid is the same as was excepted and reserved to the lord by the grant of the 23rd September, 1762, and since that grant was held by him and the several successive rectors as the garden of the rectory house, with conservatories, hothouses, &c. erected.

(The succeeding entries relate to other tenements.)

The following entries also (which are abridged in this report) appear on the rolls of the court :

On the 10th December, 1706, at a court of *John Webb*, then rector, *Marshall Sutton*, and *Elizabeth Beard*, and *Henry Abbot*, surrendered into the hands of the lord all that parcel of land then used for a garden, called *News*, otherwise *Sutton's garden*, parcel of a customary half yard land, then in the tenure of the said *Marshall Sutton*.

At the same court *William Ricketts* and *John Webb*, gent., surrendered into the hands of the lord all that other parcel of land called *Stocks' orchard*, parcel of a half yard land then in the tenure of said *Ricketts*, called *Stocks*.

Whereupon the lord granted all that parcel of land aforesaid, called *News*, otherwise *Sutton's garden*, and all that other parcel of land called *Stocks' orchard*, to *Charles Parsons*, *Susannah Parsons*, and *Mercy Parsons*, his daughters, for their lives, at the rent of 1s. and 10s. in lieu of a heriot.

At the same court the lord granted to said *Marshall, Beard* and *Abbot* the remainder of said half yard land, called *News*, otherwise *Sutton's*, except the garden aforesaid, to hold for their lives under the usual rent, &c. and heriots for and in respect of the half yard land aforesaid.

At the same court the lord granted to said *Ricketts* and *Webb* the remainder of said half yard land, called *Stocks*, to hold for their lives under the usual rents, &c. and heriots in respect of the aforesaid half yard land, called *Stocks*.

1745, Nov. 15. At a court of *Prideaux Sutton*, lord and rector, he granted to *W. Ricketts* the reversion of all that parcel of land called *News*, &c. theretofore in the possession of *Marshall Sutton*, also that other parcel, &c. called *Stocks' orchard*, (all which were then in the possession of *Charles Parsons*,) to hold for his life, after the death or forfeiture of *Susannah Ashly*, widow, and *Mercy*, the wife of *Thomas Hayward*, at the yearly rent of 1s. and 10s. in lieu of a heriot.

1762, Sept. 23. At a court of said *W. Davenport*, the

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then rector, *J. Ricketts* surrendered into the hands of the lord *News* and *Stocks'* orchard.

At same court said *Ricketts* took out of the hands of the lord *Stocks'* orchard, to hold to *J. Ricketts*, *W. Ricketts* and *E. Ricketts*, for their lives.

At same court, the lord granted to *W. Ricketts* and *E. Ricketts*, sons of *J. Ricketts*, and to *J. Ricketts* their father, *News*; also a certain orchard, called *Warder's* orchard, then or late in the occupation of *Thomas Warder*, to hold for their lives at the yearly rent of 1s. 6d., fealty, &c., and for a heriot 10s. and all other rents, &c.

At same court *T. Hayward* and *Mary*, wife of *T. Warder*, surrendered into the hands of the lord all that half yard land, theretofore in the occupation of *Alice Rickards* and afterwards of *Marshall Sutton*, except the barns and stables theretofore erected and the close of pasture whereon the barn was standing; also one other half yard land theretofore in the possession of *Ann Helmes*, widow, and afterwards of *R. Bompas* and *J. Smith*, and formerly held by *Marshall Sutton*.

At same court the lord granted to *Paul Berrington*, *Rowland Bradstock* and *Samuel Drinkwater*, trustees for said lord, the premises aforesaid, together with the excepted barn and stables and the close of pasture whereon the barn was standing; and also one other customary messuage and one other half yard land, formerly in the possession of *E. Sutton*, widow, and afterwards of *Marshall Sutton*, and then in the occupation of *J. Ricketts* as under-tenant, to hold for their lives at the usual rents and services, and 2s. 6d. for every heriot, fealty, &c.

At same court *T. Warder* surrendered into the hands of the lord one customary messuage, four acres of arable land, and half an acre of meadow land, formerly *J. Butler's*, late in the occupation of *E. Clifton*, and then of said *Warder*, whereupon the lord granted to *S. Drinkwater*, *W. Ricketts* and *E. Ricketts* (as trustees for the lord), the aforesaid premises, except a certain orchard, part of the said pre-

mises, called *Warder's* orchard, to hold for their lives at the yearly rent of 6s. and two hens.

1775, Jan. 20. At a court of said lord, *P. Berrington*, *R. Bradstock* and *S. Drinkwater*, surrendered into the hands of the lord all that half yard land theretofore in the occupation of *Alice Richards*, and afterwards of *Marshall Sutton*, with the barn and stables theretofore erected, and the close of pasture whereon the barn then stood; and also one half yard land, theretofore in the possession of *Ann Helmes*, and afterwards of *R. Bompas* and *J. Smith*, and formerly held by *Marshall Sutton*: also one other customary messuage, and one other half yard land, formerly in the possession of *E. Sutton* and afterwards of *Marshall Sutton*, and then in the occupation of *John Ricketts*.

At same court the lord granted to *J. Bradstock*, *B. Davenport* and *M. Davenport* (trustees for said lord), the premises aforesaid, to hold for their lives, at the usual rent and services, and 2s. 6d. for every heriot.

1826, Sept. 2. At a court of *John Keysall*, rector, &c. the death of *J. Bradstock* was presented, by whose death there fell to the lord for heriots inter alia, for premises formerly *Eleanor Smith's*, 2s. 6d., and that *Mary Ann Shakespear* was the person next entitled in reversion to the lands, &c. of which he died seised, except a cottage and garden in Church Street, in the occupation of — *Saunders*, widow: *M. A. Shakespear* was admittted tenant in possession, except as to said cottage and garden, to the premises aforesaid.

The question for the opinion of the Court is, whether the grant of the 23rd Sept. 1829, of the garden therein mentioned, is a valid grant, and whether the lessors of the plaintiff are, or either of them is, entitled to recover the possession of such garden.

If the Court shall be of opinion that the grant is valid, and that the lessors are, or any of them is, so entitled to recover, the verdict is to stand. But, if the Court shall be of opinion that the said grant is not valid, a nonsuit is to

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be entered. The Court may draw any inferences or find any facts which, in the opinion of the Court, the jury ought to have drawn or found.

*Cresswell*, for the lessors of the plaintiff (a), in support of the grant of 23rd Sept. 1829, referred to *Snag v. Fox* (b), *Attree v. Scutt* (c), *Garland v. Jekyll* (d), *Holloway v. Berkeley* (e), as cases where the right of the lord to divide a copyhold tenement seemed to be assumed. He also referred to *Co. Compl. Cop. s. 34*, to shew that the custom of the particular manor was sufficient to warrant the grant.

*Hodgson* contra contended that the lord of a manor cannot in any case divide a copyhold tenement; that at all events the lord in this case had no such power, as he had merely a limited interest, and was seised in jure ecclesiæ; that, even if the lord had such power, the grant was rendered invalid by the reservation of a rent different from the ancient rent, the yearly rent reserved for the premises in question being 2s., whereas the ancient rent of the entire tenement, of which these premises were part, was 10s. and two hens. To shew that the lord must reserve verum et antiquum redditum, and that this rule applied even to voluntary grants of escheated lands, he cited *Co. Compl. Cop. s. 41*; *Gilb. Ten.* 196; *2 Bl. Com.* 370; *Popham C. J.* in *Gay v. Kay* (f), and *Harris v. Jays* (g).

*Cresswell*, in reply, cited *Com. Dig.*—"If the copyhold comes to the lord by escheat, &c. he may make a grant of it, rendering a greater rent: per *Lea*, *2 Rol.* 236;" and pointed out that the aggregate rent for the entire tenement

(a) The case was argued in Trin. term last (June 1, 1841), before Lord Denman C.J., *Patteson*, *Williams* and *Coleridge* Js.

(b) *Palm.* 342.

(c) *6 East*, 476.

(d) *6 Bing.* 292.

(e) *6 B. & C.* 2; *S. C.* 9 D. & R. 83.

(f) *Cro. Eliz.* 661.

(g) *Cro. Eliz.* 699.

had been increased, so that the lord had not prejudiced his successor. [*Coleridge J.* In 2 *Bl. Com.* 370, it is said that the lord can neither add to nor diminish the ancient rent.]

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Lord DENMAN C. J. now delivered the judgment of the Court as follows:—The facts of this case, which are important for raising the question to be decided, are the following. The rector of Bredon for the time being is lord of the manor of the rectory of Bredon. The lessors claim under a copyhold grant from a deceased rector against the present rector, who is the defendant. The premises in dispute, now forming the rectory gardens, were formerly parcel of a copyhold tenement held at an entire rent. In 1755 the whole fell into the hands of the lord, a Mr. *Davenport*, who granted it to three persons for their lives and that of the survivor in trust for himself. In 1762 the grantees surrendered, and the same lord regranted it on the same trusts to the same grantees, at the same rent, “*excepting and always reserving to the lord for the time*” the garden now in question. In 1775, on a surrender to the same lord, he made a similar grant, with the same exception, to other grantees in trust for himself. In 1813 a similar reversionary grant, with the same exception, was made by a Mr. *Keysall*, a succeeding rector, and, on the 23rd September, 1829, he granted to *Rayer* and the two *Allards* (who make the first demise to the plaintiff) in trust for himself, and to surrender, whenever required by him or his personal representatives, the garden in question, to hold for their lives and that of the longest liver at a new rent of 2s. The question in this case is the validity of this grant.

It was not seriously contended, nor could be, that the grant was objectionable because the land had been for some time before in the hands of the lord and not actually demised, nor merely because the interest granted might by possibility endure, and had in fact endured, beyond the life

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and interest of the grantor, both of these standing upon points of copyhold law well settled; but it was strongly insisted that the general law of copyholds does not enable the lord, who is only so *pro tempore*, to make severance of any copyhold tenements not of inheritance, because thereby the successor may be prejudiced; and, further, that in this case there was no evidence, which would warrant us in finding the existence of any special custom in this manor, making such a severance as this legal.

It will appear on examination that these two objections resolve themselves substantially into one. According to general principles the grants of any one person with a temporary interest would expire with the determination of that interest; the special principle on which the copyhold grants of a lord *pro tempore* stand good after his estate has ceased, is that the grantee's estate is not derived out of the lord's only, but stands on the custom. This principle is agreed on, and was appealed to on both sides in the argument with equal confidence. Lord *Coke*, in his *Complete Copyholder*, is very full on this point in sections 34 and 41, and illustrates the principle by a number of satisfactory instances. But, if it be the custom which renders such grants valid, it must follow that the custom must be observed. It would be a contradiction in terms, to say that an estate stands on a custom, which in any substantial particular does not comply with and is not warranted by the custom. Accordingly Lord *Coke*, s. 34, says, "therefore what *custom doth confirm to a copyholder*, the law will ever allow, and never seek to avoid it in respect of any such imperfection in the grantor's person; and the quality of the lord's estate is no more respected than the quality of his person, for if his interest be lawful, be his estate never so great or never so little, 'tis not material; for be it in fee, or be it in tail, or dower, or as tenant by the curtesie, for life or for years, as guardian, or as tenant by statute, or as tenant by elegit, or *at will*, the least of these estates is a sufficient warrant to the lord to grant any copyhold escheated unto

him for as long time as the custom doth allow, *the ancient rents and services being truly reserved.*" And upon the same principle, in s. 41, he observes, that in voluntary admittances the lord is bound to observe the custom precisely in every point, and can neither in estate nor tenure bring in any alteration. The reservation of "the true and ancient rent" is a particular in which he says the law is very strict, an alteration of the quality, though the quantity be the same, as from gold to silver, or of the times of payment, as from four feasts in the year to two; such departures as these from the customary reservation he states to be of force to destroy the grant.

In the case of *Gay v. Kay (a)*, *Popham C. J.* expresses himself thus, "the reason why tenant in dower, or a particular tenant, may grant a copyhold in reversion as well as in possession, is the custom, and thereby the grant is warranted; and therefore there is not any difference in either of the cases: but one who hath a particular estate in a manor cannot grant a copyhold by parcels, or demise part and retain the residue himself."

In the present case the substance of the dealing with this tenement has been this—*Mr. Davenport*, desirous of prolonging a beneficial interest in it beyond his incumbency, grants it to trustees for himself for their lives, but desirous of attaching the garden to the rectory, excepts that, out of the grant, to the lord for the time being. *Mr. Keysall*, his successor, feeling perhaps that he has been ill used by him, but not averse to following his example, has made a similar grant of the garden, all that remained, in his own favour. *Mr. Davenport*, although he granted not the whole of the tenement, reserved the ancient entire rent that had been paid for the whole. *Mr. Keysall* has reserved not the ancient rent for the whole tenement, nor any sum stated to be an apportioned part of it, but an entirely new rent of 2s. The authorities above cited shew that by the general law of copyhold this cannot be done, so as to be valid against the

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(a) Cro. 661.

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successor; for the custom which alone could give the power has not been pursued.

The plaintiff must therefore rely on the facts stated in the special case, as furnishing grounds from which we ought to find a special custom, on which this grant may be supported. A custom such as this ought to be made out by clear and satisfactory evidence, for it is in derogation of general principles, and may lead to the serious prejudice of the successor, who cannot at the time the act is done interfere for his own protection, for it is uncertain then who he may be, and he has no title, and who coming perhaps to the living after a lapse of many years may find difficulty in ripping up the transactions of his predecessor.

We think the evidence here offered quite insufficient, the instances are few, they relate mostly to one tenement, and mostly occur in the long incumbency of Mr. *Davenport*, who began the injurious dealing with this very tenement.

From such instances, though possibly a jury might, we think they ought not, to have found a special custom, and as we are for this purpose substituted for the jury, we decline to find it. Our judgment therefore will be for the defendant.

*D.*

Judgment for the defendant.

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FLATHER *v.* STUBBS and another, Assignees of LASHMAN,  
 a Bankrupt.

Wednesday,  
 January 12th.

An agreement for sale of a bankrupt's property by his assignees is exempted from stamp duty by 6 Geo. 4, c. 16, s. 98.

**ASSUMPSIT** to recover a deposit paid by the plaintiff to the defendants, on an agreement for the sale of land by the defendants to the plaintiff, on the ground of a defect in the title. The declaration contained a special count setting forth an agreement for the sale, with a further agreement for the enlargement of the time of performance, and alleged as breach, the non-delivery of an abstract within the enlarged time. There were also counts for money had and received, and on an account stated.

The defendants pleaded the general issue to the whole declaration, and several special pleas (on which no question arose) to the first count.

At the trial before Lord *Denman* C. J., at the Middlesex sittings after Michaelmas Term, 1840, there was tendered in evidence, on behalf of the plaintiff in the first instance, an agreement at the foot of the usual advertisement and conditions of sale by auction, in which advertisement the land was stated to be put up for sale by the defendants as assignees of one *Lashman* a bankrupt, which agreement was signed by the plaintiff only, and was unstamped. It was objected on behalf of the defendant that it required a stamp. To this it was answered, that only the further agreement for enlargement of the time, and not the first agreement, was in issue under non-assumpsit, and *Smith v. Parsons*(a), *De Pinna v. Polhill*(b), and *Gibson v. Harris*(c) were cited, and therefore that it need not be produced stamped; and further that, the first agreement being signed by the plaintiff only, there was no complete contract until a subsequent correspondence between the plaintiff and an agent of the defendants, having reference to the agreement and extending the time for its performance, one letter of which correspondence bore a stamp. His lordship was of opinion that the first agreement was put in issue by non-assumpsit, and that the stamp upon the subsequent correspondence referring to the agreement, did not supply the want of a stamp upon the agreement itself. The plaintiff thereupon was nonsuited.

*Platt*, in Hilary Term, 1841, obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had, on several grounds, but as the case ultimately turned upon one only, the other grounds and the argument upon them are omitted. The ground on which the judgment of the Court was ultimately given was, that, the agreement

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(a) 8 C. & P. 200, n.

(b) 8 C. & P. 78.

(c) 8 C. & P. 378.

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having been made on the sale of a bankrupt's landed property by his assignees, was exempted from stamp duty by 6 Geo. 4, c. 16, s. 98, which enacts that, "all commissions of bankrupt, and also all deeds, conveyances, assignments, surrenders, admissions and other assurances of, or to, or relating solely to any freehold, leasehold, copyhold, or customary messuages, lands, or tenements, or any mortgage, charge or other incumbrance upon, or any estate, right, or interest of and in any messuages, lands, tenements, or personal estate, being the estate of or belonging to any bankrupt or bankrupts, or any part or parcel thereof, and which after the execution of such deeds, conveyances, assignments, surrenders, or assurances respectively shall, either at law or in equity, be or remain the estate and property of such bankrupt or bankrupts, or the assignee or assignees appointed or chosen by virtue of the commission issued against him or them respectively, and also all powers of attorney, writs of supersedeas and procedendo, certificates of conformity, affidavits, and all other instruments and writings whatsoever relating solely to the estate or effects of any bankrupt or bankrupts, or any part thereof, or to any proceedings under any commission of bankrupt, and all advertisements inserted in the London Gazette relating solely to matters in bankruptcy, shall not be liable to any stamp duty or any other government duty whatsoever, and all sales of any real or personal estate of any bankrupt or bankrupts shall not be liable to any auction duty."

*Thesiger* and *Swann* shewed cause (a). The 98th section of the Bankrupt Act is altogether inapplicable. The only words which can include the agreement in the present case are, "all other instruments and writings whatsoever, relating solely to the estate or effects of any bankrupt," but these words, though per se of general import, can, according to the well-known rule of construction, only include such instruments and writings as are *ejusdem generis*

(a) In Mich. T. last (Nov. 27th), before Lord Denman C. J., *Williams, Coleridge* and *Wightman* Js.

with those previously mentioned in the same section. Those are, first, certain conveyances by which no interest passes to any person but the bankrupt or his assignees, and, secondly, certain documents connected with the practical proceedings under the fiat. No solid distinction for this purpose can be pointed out between a conveyance under which a third party takes an interest, and an agreement by which he becomes entitled to have such a conveyance executed to him. The conveyance would clearly require a stamp under the 98th section, and so ought the agreement. The plaintiff claims an exemption from stamp duty, and, inasmuch as an enactment imposing such a duty ought to be clear and express, so ought the enactment exempting any particular case to be clear and express also. Here there is no such express exemption. There is nothing in the construction put, upon the very clear exemption from auction duty under 19 *Geo.* 3, c. 56, s. 15, and 6 *Geo.* 4, c. 16, s. 98, in *Rex v. Winstanley (a)* and in the earlier cases, to authorise the wide construction suggested on behalf of the plaintiff.

*Platt and Willes* contra. The rule "*ejusdem generis*" does not apply here, because there will be nothing for the general words "all other instruments and writings *whatsoever*," &c. to operate upon, if they are confined in construction to instruments of a similar kind to those previously mentioned in the 98th section. It is impossible to suggest any form of expression, (short of specifically using the word "agreement,") which would more clearly convey the intention of the legislature, that such instruments as the present agreement should be exempt from stamp duty. The supposed analogy between a conveyance to a purchaser and an agreement for the purchase does not hold, for there are these marked distinctions, namely, that the assignees have a right of action on the agreement, but none on the conveyance, and the costs of the conveyance always fall upon the purchaser, whereas the assignees would have to pay

(a) 2 Y. & J. 124; S. C. 1 C. & J. 434; 5 Bligh, (N. S.) 130.



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for the stamp on the agreement, if they wished to enforce it. As to the proposition, that an enactment introducing an exemption from stamp duty should be construed strictly, the contrary was expressly decided in *Warrington v. Furber*(a), where Lord *Ellenborough* C. J. said, "that, where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception confining the operation of the duty." The decisions alluded to as to the exemption from the auction duty, except *Rex v. Winstanley*(b), turned upon the wording of a totally different clause in a former act, and therefore have no reference to the present question. The general doctrine acted on in *Rex v. Winstanley*(b), and already referred to, is strongly in favour of the exemption.

*Cur. adv. vult.*

Lord DENMAN C. J. delivered the judgment of the Court.—This was an action brought to recover a deposit on a sale by auction of premises which had belonged to a bankrupt. Among other pleas, non-assumpsit was pleaded. The contract of sale was produced, and was without a stamp, and a nonsuit was entered. The plaintiff afterwards obtained a rule for a new trial, resting his argument on the stat. 6 *Geo.* 4, c. 6, s. 98, which had not been mentioned at the trial, by which an exemption from stamp is granted to "all deeds, conveyances, &c., and all other instruments and writings whatsoever relating solely to the estate and effects of any bankrupt," &c. (His lordship read the section.) We are of opinion that this contract of sale falls within the very words of the exemption, being an instrument relating solely to the estate of the bankrupt. We cannot accede to the argument drawn from one or two decisions to the contrary. The case cited of *Rex v. Winstanley*(b) lays down the principle on which the exemption from stamp duty might be contended for in this case,

(a) 8 East, 242.

(b) 2 C. & J. 434.

inasmuch as on comparison of the several acts the stamp does not appear to be imposed in clear and unambiguous words. But we do not think it necessary to apply that principle, as we are of opinion that the exempting words of sect. 98 are strictly applicable to the case.

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*D.*

Rule absolute.

## HILARY VACATION.

COOPER v. BLICK and others.

**ASSUMPSIT.** The first count of the declaration stated that on the 1st July, 1839, in consideration that the plaintiff, at the request of the defendants, would enter into the service of the defendants, to wit, in the capacity of editor of and reporter for a certain newspaper of the defendants, called, to wit, "Ariss's Birmingham Gazette," at and for a certain salary or wages, to wit, 400*l.* per annum, and would continue in such service, on the terms aforesaid, until the expiration of three months after warning, given by the plaintiff or by the defendants to the other of them, the defendants or the plaintiff respectively, of his or their intention to determine such service, they the defendants then promised the plaintiff to retain and employ the plaintiff in their the defendants' service in the capacity aforesaid, and at or for the salary or wages aforesaid, and to continue him in such service until the expiration of three months after such notice or warning, given by the plaintiff or the defendants to the other of them the defendants or the plaintiff respectively, of his or their intention to determine the service or else to pay him the plaintiff a proportionate part of the said salary for three

that, as it was laid under a *videlicet*, the plaintiff, if the contract had been denied, would not have been bound to prove the precise sum.

That the defendant therefore had not by his plea of payment into Court admitted a contract for the specific salary of 400*l.*

*Friday,*  
*February 4th.*

In a count on a special contract the plaintiff declared that he was engaged as a newspaper editor "at a certain salary, to wit, 400*l.*" and claimed a quarter's salary as damages for dismissal without notice.

Plea, payment of 37*l.* 10*s.* into Court and no damages ultra.

Replication of damages ultra, and issue thereon.

*Held*, that the precise sum of 400*l.* in the declaration was not in its nature material, and

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months. That the plaintiff entered the service upon the terms aforesaid, and so continued for a long space of time, to wit, until and upon the 17th December, 1840. That, although the plaintiff offered to continue in the service until the expiration of three months after notice or warning given by the defendants to the plaintiff of their intention to determine such service, yet the defendants, disregarding &c., discharged the plaintiff without such notice as aforesaid, and refused to pay him a proportionate part of his salary for three months. (There were other counts, which are not material.)

Pleas, 1. To the first count, payment into Court of 37*l.* 10*s.*, and a denial of damages ultra.

Replication of damages ultra, and issue thereon.

At the trial before Lord *Abinger* C. B. at the Warwick Spring Assizes, 1841, several questions, which are not material to state, were raised upon the pleadings. The principal question was whether the defendant, by the payment into Court under the first count, had admitted that 400*l.* was the specific salary agreed for as stated in that count.

The jury found that there was a contract at 150*l.* a year, and no other contract, and returned a verdict for the defendant.

*Humfrey*, in the following term, moved, in pursuance of leave reserved at the trial, to enter the verdict for the plaintiff for 62*l.* 10*s.*, being the balance to which the plaintiff would be entitled over and above the 37*l.* 10*s.* paid into Court, for the want of the three months' notice, if the salary were to be taken at 400*l.* a year instead of 150*l.*

*Goulburn* Serjt., *Whitehurst* and *Willmore* now shewed cause. The amount of salary being in itself an immaterial part of the contract, and averred under a videlicet, is not admitted by the payment into Court. The authorities upon the effect of a videlicet on material and immaterial averments are collected in 2 *Wms. Saund.* 290a, n.(1), and the doctrine of videlicets fully discussed. The sum laid may be

made material if not laid under a videlicet, as in *Durston v. Tuthan* (cited in *Symmons v. Knox*(a)), *Cox v. Brain*(b), *Arnfield v. Bate*(c). The principle is, that, in those and similar cases, where there was no prefatory general allegation of price or value, there would remain no allegation of price or value at all after the sum so laid without videlicet had been rejected. Therefore it is usual to allege price or value first of all generally "at a certain price &c.," and then particularly under a videlicet, naming the sum, so that there may be a sufficient general averment of price &c., though the subsequent averment of the particular sum be rejected. There are also cases where the particular sum is made material by statute, as in *Symmons v. Knox*(a) already cited, or by the nature of the transaction in question, as in usury cases. But the general rule is, that the precise sums of money are the subject of immaterial averments: *Rucker v. Pulsgrave*(d), *Everth v. Bell*(e), *Crispin v. Williamson*(f), *Bayley v. Tucker*(g), *Stoveld v. Brewin*(h), *Lechmere v. Fletcher*(i), most of which cases were cases of payment into Court to declarations on special contracts, and it was held that the specific amount in the declaration was not admitted. The general rule seems to be the same as to the immateriality of averments of quantity in contracts; *Gladstone v. Neale*(k), *Crispin v. Williamson*(f): and so as to averments of time: *Forty v. Imber*(l), and see *Carvick v. Blagrove*(m). In *Preston v. Butcher*(n), it was held that a contract for a yearly salary must be proved as laid, although both time and sum were laid under a videlicet. There, however, it is to be observed that the plaintiff failed in an essential particular, as he could not shew that there was a contract for *any* specific sum, and the case was com-

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(a) 3 T. R. 67.

(b) 3 Taunt. 95.

(c) 3 Mau. &amp; S. 173.

(d) 1 Taunt. 419.

(e) 7 Taunt. 450.

(f) 8 Taunt. 107.

(g) 2 B. &amp; P. (N. R.) 458.

(h) 2 B. &amp; Ald. 116.


(i) 1 C. &amp; M. 623.

(k) 13 East, 410.

(l) 6 East, 434.

(m) 1 B. &amp; B. 531.

(n) 1 Stark. N. P. C. 3.

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promised, so that the ruling of Lord *Ellenborough* was not reviewed. [*Patteson* J. Would a *videlicet* make the sum immaterial in an action on a bill of exchange?] There the sum would be part of the description.

If the contract had been in issue the plaintiff would not have had to prove the precise sum. The defendant, by admitting the contract, cannot have admitted more than the plaintiff would have had to prove, if the contract had been denied. The defendant therefore has not admitted the sum.

If the plea admits the sum as well as the other particulars of the contract, the plea of payment of 37*l.* 10*s.* only would be demurrable.

*M. D. Hill* and *Humfrey* *contra*. If the sum in a special contract is not material, it is difficult to say what part of the contract is material. Is the capacity in which the plaintiff states he was engaged material, or might he, because he has stated under a *videlicet* that he was engaged as editor and reporter, prove an engagement as clerk or porter at a few shillings a week? It is not intended to dispute that the duty of the plaintiff to prove the precise sum is the test by which to ascertain whether the defendant has admitted the precise sum. But it is clear that the plaintiff was bound to prove the sum. "There can be no doubt," says *Parke* B. in *Kingham v. Robins* (a), "as to the effect of such a plea, (a plea of payment into Court,) when pleaded to a special count, it then operates as a confession of the debt as alleged in the declaration," *Preston v. Butcher* (b) is a direct authority, and conclusive in the plaintiff's favour.

Lord DENMAN C. J.—The plaintiff states in the first count of his declaration, that the defendant engaged him as editor and reporter at a certain salary, "to wit, 400*l.* per annum;" money has been paid into Court on this count, and it is said the defendant has thereby admitted that the contract was to pay the particular sum of 400*l.* as such salary. The

(a) 5 M. & W. 99.

(b) 1 Stark. N. P. C. 3.

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question is whether the specific amount is so admitted. I believe it has long been the universal opinion of Westminster Hall, that sums of money as stated in pleading are not material, unless, from the nature of the case, as by their forming an essential part of some calculation or otherwise, they necessarily become material. Certainly the very reason why a party lays the sum under a *videlicet*, is that he may not be bound to prove it exactly. Now, if the plaintiff, in declaring upon this contract, could, by laying the sum under a *videlicet*, exempt himself from the obligation of proving the exact sum, how can he say that the defendant, by admitting the contract so laid, has admitted more than he himself undertook to prove? In an action to recover 20*l.* for a year's rent as due under a demise, if judgment were to go by default, and it turned out that the rent reserved was 10*l.* only, the jury would be bound to assess the smaller sum. I think the plaintiff in this case has not admitted the sum alleged in the declaration, and that it would be mischievous to introduce any doubt on the subject.

PATTERSON J.—I think in this case the allegation as to the capacity in which the plaintiff states he was engaged is material, and, of course, no *videlicet* could make it otherwise. The question is whether the amount of salary laid under a *videlicet* is material, and whether the defendant has admitted the amount by his payment into Court. I agree that the true test, by which to try whether the defendant has admitted the amount, is whether the plaintiff, in an issue on *non assumpsit*, would have been bound to prove the amount, for it would not be fair that one party should be fast and the other loose. The case of *Preston v. Butcher* (*a*) seems to be strong in the plaintiff's favour, but I do not know that it shews the precise sum to be material, for the plaintiff there could not prove *any* specific contract whatever, he could not even prove his contract for an annual service. No other cases that I am aware of make the sum material. I put the instance of the sum in a bill of exchange, and Mr.

(*a*) 1 Stark. N. P. C. 3.

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*Whitehurst* gave the proper answer, that there the sum was part of the description. Here, however, the sum is not matter of description, and has been laid under a *videlicet* by the plaintiff for the very purpose that he might not be bound to prove it, if the contract had been denied. He himself has put the sum as immaterial, and, as he has put it, so he must take it. If he had omitted the *videlicet*, he would have been bound by his declaration, and by parity of reasoning the defendant would have been equally bound by his admission. The sum is not in its nature material, and the *videlicet* has saved it from becoming material in the declaration. The defendant therefore in his plea has not admitted the sum.

D.

Rule discharged.

THE QUEEN v. The Visiting Justices of the MIDDLESEX  
COUNTY LUNATIC ASYLUM (a).

By 9 Geo. 4, c. 40, ss. 30 & 32, an act for the regulation of lunatic asylums, the visiting justices have the power of appointing and dismissing the chaplain of the asylum.

*HALCOMBE* Serjeant, in Michaelmas term last, had obtained a rule calling upon the defendants to shew cause why a mandamus should not issue commanding them to admit *Francis Tebbutt*, clerk, into the asylum to perform his duties as chaplain of that asylum &c.

The applicant had been appointed to the office of chaplain to the asylum in July, 1839, shortly after which he entered on the duties of his office. He was licensed by the Archbishop of Canterbury in January, 1841, and dismissed by the justices a few months afterwards, and another chaplain had been appointed by the visiting justices in his stead.

Cause was now shewn by

Sir *W. W. Follett* S.G. and *Whitehurst*, and

*Halcombe* Serjt. and *W. H. Watson* supported the rule.

(a) Decided during the term (Jan. 14).

The question whether mandamus would lie under the circumstances was adverted to, but the discussion proceeded almost wholly on the general question whether the chaplain of a lunatic asylum, under 9 *Geo.* 4, c. 40, could be dismissed by the visiting justices under sect. 30. The argument is fully noticed in the judgments.

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Lord DENMAN C. J.—It appears to me that this rule must be discharged. If we entertained any doubt on the question, we should make the rule absolute, in order that the question might be more formally considered on the return to the mandamus. It is contended that the 32d sect. of the stat. 9 *Geo.* 4 (*a*), c. 40, requiring that there

(a) “An Act to amend the Laws for the Erection and Regulation of County Lunatic Asylums, and more effectually to provide for the Cure and Maintenance of Pauper and Criminal Lunatics in England.”

Section 8 provides for the management of such asylums by the visiting justices of the county.

Sect. 30 enacts, “That in all cases where any such county lunatic asylum shall have been established under the authority of this act, or any former act or acts, the major part of the visitors appointed as aforesaid to superintend the same, present at a meeting duly summoned, such major part not being fewer than three, shall from time to time make such regulations as to them shall seem expedient for the management and conduct thereof, in which regulations shall be set forth the number and description of *officers* and servants to be kept, the duties to be required, and what salaries respectively shall be paid to them, and *may appoint* a treasurer and such other *officers*

and servants, together with such number of assistants as they shall from time to time find necessary, in proportion to the number of persons confined in such county lunatic asylum, and *may dismiss any such officer*, servant, or assistant if they see occasion, and shall from time to time fix a certain weekly rate to be paid for each person confined in such county lunatic asylum, which may be sufficient to defray the whole expense of the maintenance and care, medicine, and clothing requisite for such person, and the salaries of the officers and attendants.”

Sect. 32 enacts, “Provided always and be it further enacted, that, in every case where a county lunatic asylum shall be provided, a chaplain shall be appointed for the same, which chaplain shall be in full orders, and shall be licensed by the bishop of the diocese, and the said licence shall be revokable by the bishop whenever he shall think fit to withdraw it; and such chaplain shall perform on each Sun-



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shall be a chaplain appointed for the lunatic asylum, "which chaplain shall be in full orders, and shall be licensed by the bishop of the diocese, and the said license shall be revocable by the bishop whenever he shall think fit to withdraw it," gives to the bishop the power of appointing the chaplain, because it gives him the power of revoking the licence under which the chaplain is to officiate. But I think the only rational way of construing the 32d sect. is to construe it in connection with the 30th. If it had been intended to give the power of appointment to the bishop, the legislature would probably have used express words for the purpose, and all that appears to me to be provided for, with reference to the bishop's authority, is that the chaplain is to exercise his office subject to a licence, which the bishop is empowered to grant or to withhold or to revoke when granted.

The 30th section certainly gives no direct power to the visiting justices to appoint a chaplain at all, unless he falls

day, and on the great festivals, the divine service of our Church, according to the forms by law established."

The 4 Geo. 4, c. 64, "An Act for consolidating and amending the Laws relating to the Building, Repairing and Regulating of certain Gaols," &c. enacts,

Sect. 28, "That the justices assembled in general or quarter sessions shall, and they are hereby required, from time to time to nominate for each prison within their jurisdiction, to which this act shall extend, a clergyman of the Church of England to be chaplain thereof," &c.

Sect. 29, "That no clergyman so nominated shall officiate in any prison until he shall have obtained a licence for that purpose from the bishop of the diocese wherein the

prison is situate, nor for any longer time than while such licence shall continue in force, and notice of every such nomination shall, within one month after it shall take place, be transmitted to the bishop by the clerk of the peace or town clerk."

Sect. 30 prescribes the particular duties to be performed by the chaplain, and then concludes thus, "and if it shall appear, to the justices in general or quarter sessions assembled, that any chaplain is incompetent to the due performance of his duties, or is unfit to be continued in his office, or shall have refused or wilfully neglected to perform the duties required of him by the rules and regulations to be made as directed by this act, they are hereby empowered to remove him from such office."

within the description of an "officer." It may be regretted that the language of the section does not point more specifically to the appointment of a chaplain; but that the word "officer" is sufficient to include a chaplain was decided very recently in *Reg. v. The Guardians of the Bruintree Union (a)*. If then the chaplain is an "officer" within the 30th sect. he is to be appointed, in like manner with others who come under the same description, by the visiting justices, and may also, as "such officer," be dismissed by them, for it is expressly enacted that they "may dismiss any such officer, servant or assistant, if they see occasion." These latter words seem to give a large discretion to the visiting justices. The provisions of the Gaol Act, stat. 4 Geo. 4, c. 64, are very different. That act defines the particular duties which the chaplain has to perform, and also the particular circumstances under which he may be removed from office, so that if he were removed improperly he might come to this Court and challenge the justices to shew that his conduct had been such as to make him removable within the provisions of that act. There may be very good reasons for the distinction between the two acts. The duties of the chaplain towards persons in gaol who are not afflicted by mental infirmity may be comparatively of a so uniform and definite character, that the particular misconduct which would be a ground of removal may be specified, so as to make it unnecessary to give any latitude to the justices in that case. But in the present case the mere mention of religious subjects to some of the unhappy inmates of the asylum might be most injudicious, and cause a great aggravation of their malady.

I do not know that it is necessary to go further to shew the grounds of my opinion that the bishop is not the person to appoint. His Grace the Archbishop of Canterbury in this case certainly had a right to see that the visiting justices appointed nobody who was not a clergyman of the

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Church of England, and considered by him a proper person to license for the performance of the services of our Church, at least he could withhold his licence from any clergyman who was not so qualified. It is impossible, however, to believe that the performance of these services can be the only duty of a chaplain at an institution of this kind, where patients may be suffering in various stages of their disorder, and differ so widely from each other in their capacity of profiting by religious consolation, that the personal attendance of the chaplain, and in the most private manner, may constantly be required. I think therefore that we cannot revise the discretion which the magistrates have exercised, and that there is no ground for this rule.

PATTESON J.—On reading the 30th and the 32d sections together, I think there is no doubt that the visiting justices had power to remove this gentleman. Whether all the consequences of placing such a power in their hands were contemplated by the legislature, or whether difficulties may ever arise from any thing like a conflict between the bishop and the justices, if the bishop should withhold his licence from their appointee, I do not know—we must look at the language of the statute. Now the 32d section appears to me to come by way of proviso on the 30th. It is impossible, as it seems to me, to read the 32d section alone; it is not a substantive enactment, and, if it were so, would be very imperfect, because it does not say who is to appoint. That would be quite insensible, unless, as suggested in argument, it would follow as a matter of course, that the incumbent of the parish in which the asylum is would have the appointment. I think the incumbent would clearly have no such power in a case of this sort, where a particular officer is provided for a particular purpose. I think it was intended that the visiting justices should have the appointment, and the chaplain properly comes within the description of an “officer,” as that word is employed in the 30th section, and consequently he may not only be appointed, but,

as "such officer" may also be discharged by such magistrates. It is true that this power of dismissal is not so clearly expressed as in the Gaol Act, but still the Gaol Act affords a guide for the interpretation of this act, because it is clear by the Gaol Act that, though the bishop's licence is necessary to the chaplain, still the justices may remove the chaplain without the consent of the bishop. The legislature, therefore, in framing the Gaol Act, did not consider there was any insurmountable objection to their placing the power of removing an ecclesiastical person in the hands of laymen. There is no reason why the legislature should not have given the same power to the visiting justices of this asylum. On the other hand, my lord has adverted to very sufficient reasons why the legislature should have given them the power in this case. It may easily be conceived that the chaplain of a lunatic asylum might discharge the ordinary duties of a clergyman in the most unexceptionable manner, and yet from infirmity of temper or of judgment be quite unfit to attend upon the unhappy inmates of such an asylum.

It was suggested that the appointment was in the bishop. It appears to me that, by the language of the 32d section, the licence of the bishop is to be given to the chaplain *after* his appointment. If it was intended that he should have been appointed by the bishop, surely the legislature would have said so. It seems to me that it would be a perversion of language to suppose the 32d section must not have had reference to the appointment being in some other person than the bishop. To whom then can the reference be but to the visiting justices, in the 30th section; and, when once you get to that section, I do not see how you can strike out the words "and may dismiss any such officer."

COLERIDGE J.—The case may be put thus—not whether this or that person has the right of appointment, but whether this particular claimant has a right to be admitted. Take it either way—if this gentleman has not been properly

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appointed, what right can he have to this rule; if he has been well appointed, he was certainly appointed by the visiting justices, and by what authority did they appoint him? By the special authority of the 30th section, which authorises the visiting justices to appoint "officers and servants." It has been said that the chaplain cannot be included in these words. Why not? I can see nothing derogatory in so including him, especially as under the term "officer" a clergyman is included in the Gaol Act, and also, (as we lately decided in the *Braintree* case(a),) in the Poor Law Amendment Act. It is said there is a difficulty in this, that he is removeable at discretion, and removeable by laymen. But the Gaol Act gives to laymen the power of removal. And, though I admit the power given by the Gaol Act is more definite and circumscribed, yet that is no reason why we should interpret the same language of the legislature differently; and the different nature of the institutions may, as my lord has pointed out, explain why in the present case it might be thought right to leave the power indefinite, and in the other case, where also it was more capable of definition, to define it. If this gentleman was appointed under section 30 of this act, all difficulty is at an end—*there* is the power of appointment and the power of removal. Section 32 begins as a proviso, clearly having reference to some other section. There can be no doubt the 30th is the section referred to. The intervening section merely carries out more specifically a provision in section 30 with regard to the rate, and when that subject has been disposed of, then the 32d section comes in its natural place, as a proviso on section 30. The object of the latter section was to prevent the introduction of improper persons and improper doctrines into the institution. Therefore the licence of the bishop is made necessary, and that licence is also made revocable. Extreme cases may be put, such as that the justices may dismiss from mere caprice, and that the bishop may refuse

(a) 4 P. & D. 493.

to revoke the licence. But it must be remembered that the legislature is in the habit of reposing some confidence in public officers, and that it does not provide for extreme cases. The argument that the provision as to the performance of the divine service on Sundays and great festivals, is a restrictive clause, that nothing more is required of the chaplain, and, indeed, that it would be a breach of his duty to do any thing more, will not, I think, bear examination.

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WIGHTMAN J.—It was admitted that the original appointment was good, for otherwise the applicant would have no locus standi. But it is said that, though the appointment by the visiting justices may be good, they have no power of dismissal. But both the power of appointment and dismissal stand on the same footing. It is only by virtue of the connection between the 30th and the 32d sections that the justices have any power to appoint; but, if they have that power, it follows, from the very terms of the same section, that they have also the power to dismiss. If the 32d be a proviso on the 30th section, there is no difficulty at all in the case. Now in terms it is a proviso, and the intervening section applies to a different matter: for the present purpose, the two sections that are in connection together are the 30th and 32d. There is no argument upon the incompatibility of the spiritual dignity and independence of the chaplain with the powers claimed for the visiting justices, that does not also apply in full force to the case of chaplains under the Gaol Act, with this difference only, that there the lay powers are given to the justices in quarter sessions, and here to the visiting justices of the asylum.

Rule discharged.

D.



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In assumpsit against two defendants, as acceptors of a bill of exchange, drawn on them by plaintiff, one defendant, C., pleaded that he and the other defendant were partners, and as such had accepted divers bills of exchange for partnership purposes; that the other defendant accepted the bill in question in the name of the co-partnership, in fraud of him, C., and not for the partnership, but for his own private purposes, and without the consent of C., and that there never was any consideration or value received by C. for the acceptance or the payment thereof; and that the plaintiff at the times of drawing and accepting the bill had notice of all the premises.

*Held*, on special demurrer, that, as the plea alleged notice to the plaintiff, at the very time when the bill was accepted, that the implied authority of his co-partner to bind C. by the acceptance, did not exist as to the particular bill, the plea contained no confession of the acceptance in fact, and was therefore bad as an argumentative traverse of the acceptance by C. alleged in the declaration.

JONES v. CORBETT and INSOLE.

**ASSUMPSIT.** The first count of the declaration charged the defendants as acceptors of a bill of exchange, drawn on them by the plaintiff.

Plea, by the defendant *Corbett*, that for a long time, to wit, twelve months before, and at the time of, the drawing and accepting of the said bill of exchange, the defendants carried on in co-partnership together the profession or business of attorneys (*a*) or solicitors, under the name and style of *Corbett* and *Insole*; and the defendants, on divers days during that time, for the purpose of the said co-partnership, and carrying on the business thereof, accepted divers bills of exchange, using in that behalf the name and style of the co-partnership. That *Insole* accepted the bill of exchange in the count mentioned, using the name and style of the co-partnership, in fraud of him, *Corbett*, and not for the purposes of the co-partnership, but for the private purposes of him *Insole*; and that *Insole* so accepted the bill without the privity, consent or authority of *Corbett*, and that *Corbett* had not in any manner authorised or adopted the same, save and except as aforesaid. That there never was any consideration or value received by *Corbett* for the acceptance or for the payment thereof.

Of all which premises the plaintiff, at the respective times of the drawing and of the accepting of the bill, had notice.

Special demurrer, on the ground that the plea amounts to a denial of the acceptance alleged in the declaration, and

(*a*) As to the authority of attorneys in partnership to bind the firm by accepting bills of exchange, &c. see *Hedley v. Bainbridge*, *post*.

is an informal and argumentative traverse of the acceptance alleged, and amounts to the general issue, &c.

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*Gray*, in support of the demurrer. One partner has no absolute authority to accept bills for the partnership, but merely an implied authority, which may be negated by circumstances: *Lord Galloway v. Matthew* (a). As therefore the declaration charges that both partners accepted, and the plea sets up circumstances, which shew that his co-partner had no authority to make an acceptance binding upon the defendant *Corbett*, the plea is an argumentative denial of any acceptance by *Corbett*. The defendant, instead of denying the contract alleged, has stated the reasons why there was no such contract. In *Hayselden v. Stuff* (b), a plea, to an indebitatus count for work and labour, that the work was done in endeavouring to cure a smoky chimney, under the terms of "no cure no pay," was held bad, as amounting to the general issue. This plea does not confess an acceptance in fact by *Corbett*, for it states that the plaintiff, at the time of the acceptance, had notice that the acceptance by *Insole* was not an acceptance by *Corbett*.

*H. Hill* contra. The plea confesses an acceptance *prima facie*, and such as would bind the defendant *Corbett* as against a *bonâ fide* holder, and therefore does not amount to non acceptit. *Lord Galloway v. Matthew* (a) does not apply, for here the authority to bind the partnership has not been revoked. One partner has always authority to bind the firm, "unless the title of the person who seeks to charge them can be impeached:" *Wintle v. Crowther* (c), and see *Wells v. Masterman* (d), *Shirreff v. Wilks* (e), *Ridley v. T aylor* (f). The right to recover then, in this case, depends upon the title of the holder, and his title depends

(a) 10 East, 264,

(d) 2 Esp. 731.

(b) 5 A. &amp; E. 153; S. C. 6 N. &amp; M. 659.

(e) 1 East, 48.

(c) 1 C. &amp; J. 318.

(f) 13 East, 175.



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upon his knowledge of the circumstances under which the acceptance is made. But the fact itself of acceptance cannot depend upon the holder's knowledge or ignorance of such circumstances. This plea, therefore, which goes to the holder's knowledge, and not to the acceptance itself, cannot amount to a denial of the acceptance. Notice to the plaintiff is the gist of the plea, and the plea would be bad without the averment of notice. *Swan v. Steele* (a).

Again, the plea shews that, as against the defendant *Corbett*, the acceptance was "void or voidable in point of law," so that the special plea was necessary by the express terms of the new rules. *De injuriâ* would be a good replication; by this test it appears that the plea is in excuse. *De injuriâ* was replied to a similar plea in *Wilson v. Lewis* (b).

*Gray* in reply. In *Wilson v. Lewis* (b) the only question was as to the evidence in support of the issue in fact, and it was not necessary to discuss the form of the pleadings. It is admitted that the plea would be bad without the averment of notice, but the averment is, that the plaintiff had notice at the very time of acceptance. The plea therefore shews, that at no moment of time could the plaintiff treat this as *Corbett's* acceptance, and so amounts to a plea of non acceptit.

LORD DENMAN C. J.—The plea might perhaps, after verdict, be sustained on the ground that it amounts to a constructive denial of the acceptance, on the authority of *Adams v. Jones* (c). But, as the plea has been specially demurred to, we must hold it bad as being an argumentative denial of the acceptance. I have often known it held at nisi prius that the facts stated in this plea were evidence under non acceptit. Probably the plea would have been good if, after stating the special facts of the defence, it had concluded with a special traverse of the acceptance.

(a) 7 East, 210.

(b) 2 M. &amp; Gr. 197.

(c) 4 P. &amp; D. 174.

PATTESON J.—I had some doubt on the point during the argument, but I am now satisfied that the plea contains no confession of an acceptance in fact, and that it amounts to a denial of such an acceptance. One partner is generally agent of the other for the purpose of accepting bills. This is not always the case, and, where this agency does not exist, the acceptance of the one partner is not the acceptance of the other. This plea states that his co-partner was not the agent of the defendant *Corbett* in accepting this bill, and therefore denies argumentatively that it was accepted by that defendant. It has been argued that, as it depends upon the information possessed by the holder, whether bills accepted by a single partner can be enforced against the firm, a plea, averring merely that the holder had such notice as impeaches his title, cannot amount to a denial of the acceptance. But that is not so, for the plea avers that the plaintiff, at the time of the original formation of the bill, had notice that the party who accepted the bill was not *Corbett's* agent. As between *Corbett*, therefore, and the plaintiff, this is a denial of any acceptance in fact by *Corbett*. The plea might have been good if it had stated the facts and concluded with a special traverse. I think the facts would be evidence under non acceptit.

COLERIDGE J.—I am of the same opinion. *Mr. Hill* says that the plea confesses an acceptance generally, and that it relies merely on the disability of the particular individual who seeks to recover. But this question of acceptance is between *Corbett* and the plaintiff exclusively. The plea states that, at the very moment when the bill was accepted by *Insole*, the plaintiff had notice of all the circumstances, which took away *Insole's* authority to accept as agent for *Corbett*. Suppose a general authority to accept bills is clogged with an express exception that bills shall not be accepted payable to a particular person, and that such person had notice of the exception: as against that person the authority has never existed. The authority of

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*Corbett's* partner to accept the bill in question in *Corbett's* name, as against the plaintiff, never existed.

WIGHTMAN J.—The plaintiff in his declaration says that both defendants accepted the bill. The answer of *Corbett* is that he did not accept. He does not however in terms either deny or confess the acceptance, but says that it was made in fraud of him to the plaintiff's knowledge. If this is not a confession of the acceptance, the plea is bad according to the ordinary rules of pleading. Where a defendant admits an acceptance in fact, and sets up some fraud or illegality by matter subsequent, he must plead specially. But this plea does not seek to impeach the acceptance by matter subsequent; it says the acceptance never was binding on *Corbett*, inasmuch as the act of *Insole* never was *Corbett's* act. That is an argumentative denial of the acceptance alleged, and the facts stated would be evidence under the plea of non acceptit.

D.

Judgment for the plaintiff.

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IN THE EXCHEQUER CHAMBER.

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WHYTE, Administrator of ELLEN DAVY, v. ROSE.

(ERROR FROM THE COURT OF QUEEN'S BENCH.)

Monday,  
 February 7th.

Letters of administration from the Archbishop of Canterbury are sufficient to enable a person to sue, in this country, on an indenture, which, at the time of the intestate's death, was in Ireland.

**DEBT**, for arrears of an annuity, granted to one *Ellen Loneragan*, afterwards *Ellen Davy*, by an indenture made between her and the defendant.

The plaintiff sued as administrator of *Ellen Davy*, and made profert of letters of administration granted by the Archbishop of Canterbury.

Plea, after setting out the letters of administration, addressed to the plaintiff as the attorney of *M. Davy*, "husband of *Ellen Davy*, formerly *Loneragan*, spinster, late of Halifax, Nova Scotia," that Halifax, in Nova Scotia, is in

parts beyond the seas, and that before and at the time of the death of *Ellen Dary*, to wit, on the 6th Oct. 1835, the indenture in the declaration mentioned was without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland, and was not then at the time of her death to be administered within the province of Canterbury, but, on the contrary thereof, was then of the notable goods of the said *Ellen* to be administered within the kingdom of Ireland. Verification.

Special demurrer, on the ground that it is not alleged or shewn in the plea that the indenture was, at the time of the death of the said *Ellen*, bona notabilia or assets within any province or diocese of England; or that the said *Ellen* had, at the time of her death, within this realm any other assets or goods whatsoever, but, on the contrary, the plea shews the said *Ellen* and the said indenture to have been beyond seas at the time of her death, and does not in any manner invalidate the grant of the administration to the plaintiff or the plaintiff's title to sue on the said indenture. Joinder in demurrer.


Judgment was given in the Court of Queen's Bench for the defendant (a).

The case was argued in Michaelmas Vacation (Nov. 29 and 30), before *Tindal C. J. Coltman* and *Maule Js.* Lord *Abinger C. B. Parke, Alderson (b)* and *Rolfe Bs.*

*J. W. Smith* for the plaintiff in error. The plea is bad in substance and form. First, it is bad in substance. It admits that letters of administration have been granted by the Archbishop of Canterbury. It seeks to avoid them by shewing that the deed sued on was at the time of the intestate's death in Ireland: but it is submitted the grant of administration by the Archbishop of Canterbury is, not-

(a) See the case reported, 4 P. & D. 199.

(b) *Alderson B.* was not present during the earlier part of the argument for the plaintiff in error.

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withstanding, both necessary and sufficient for the purpose of suing in this country.

It is settled by the authorities in courts of equity that a metropolitan probate is necessary for the purpose of suit in this country; *Tourton v. Flower* (a), *Logan v. Fairlie* (b), *Lowe v. Farlie* (c), *Price v. Dewhurst* (d), *Swift v. Swift* (e) (which is the converse of the present case), *Tyler v. Bell* (f). And the same rule has been considered to apply to actions, *Carter v. Crost* (g). And per *Richards B.* in *Attorney-General v. Cockerell* (h), "If a foreign executor should find it necessary to institute a suit here to recover a debt, a personal representative must be instituted to administer *ad litem*."—Cited in 1 *Williams on Executors*, 270 (i). The only question therefore is, whether the rule applies to bona notabilia in *Ireland*. But that it does so may be inferred, *e converso*, from *Swift v. Swift* (e), where it was held that an English administration will not enable a party to sue in *Ireland*; and in *Carter v. Crost* (g), the proposition was directly stated. That was an action of detinue brought by *Carter*, who had taken out an Irish administration, to recover a chattel the property of the deceased. The report states that "the second point was, if an administrator made by a bishop of *Ireland* might bring an action here as administrator. And it was holden that he could not, because of the letters of administration granted in *Ireland* there could be no trial here in *England*." The plaintiff, indeed, in that case succeeded, but that was upon the ground that his suit was, in the particular case, not *as administrator* but in his own right, as owner of the chattel, of his title to which the Irish administration was evidence, "for the substance in this case was the possession and not the administration, for he might have an action of his possession without shewing the letters of administration."

(a) 3 P. Wms. 368.

(b) 2 Sim. & Stu. 284.

(c) 2 Madd. 101.

(d) 4 Myl. & Cr. 76.

(e) 1 Ball & Beatt. 326.

(f) 2 Myl. & Cr. 89.

(g) Godb. 33.

(h) 1 Price, 179.

(i) Third edit.

There seems no reason in principle why an Irish administration should be excepted from the well known rule—introduced to prevent confusion and difficulty—that the temporal courts of this country will not burden themselves with the trial of foreign titles to administration. The task of determining such questions is committed to the spiritual courts, and the reason of the rule is as applicable to Ireland as to any other country; for the English courts do not take notice of the Irish ecclesiastical law, and do not treat the acts of their courts as conclusive. *Harris v. Saunders* (a), *Mahony v. Ashlin* (b) and *Lane v. Bennett* (c) shew that for many purposes Ireland is a foreign country even since the Union (d). By considering the authority which enables administrators to sue, it will be obvious that the only person who can sue here in that capacity is the appointee of the English ecclesiastical court. At common law an administrator could not maintain an action for a debt due to the deceased, any more than the ordinary whom he represented. *Roll's Abr. Executor* (A.), pl. 1; *Vin. Abr. Executors* (A.), pl. 1.

The right to bring such an action was conferred upon him by 31 *Edw. 3*, stat. 1, c. 11, which enacted that administrators should have the same actions as executors. By virtue of this statute administrators now sue, but this statute does not extend to Ireland, nor was there any right in an Irish administrator to sue even in the courts of his own country, until *Poyning's Act* (10 *Hen. 7*, cap. 4, Irish Acts), of which see an account 1 *Bl. Com.* 101; but *Poyning's law* being an act of the Irish parliament did not extend to this country, so that unless the administrator, constituted by an English court, can sue here, no other person can, and the debt is irrecoverable.

It is obvious from this last consideration that an English administration is necessary, if any action be maintainable.

(a) 4 B. & C. 411; S. C. 6 D. & R. 471.

(b) 2 B. & Ad. 478.

(c) 1 M. & W. 75.

(d) See also *Ferguson v. Mahon*, 3 P. & D. 143.

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It is also obvious that it is *sufficient*, since an Irish administration cannot be taken notice of, and the English ecclesiastical court has power to bind foreign personalty by its grant of administration, see *Spratt v. Harris* (a). But, even if an Irish administration were required as the foundation of an English one, it would be assumed that the grant of the latter was founded upon the production to the spiritual court of the former: see the judgment of Lord Cottenham C. in *Price v. Dewhurst* (b), *Larpent v. Sindry* (c), *In the Goods of Cringan* (d). It is said, indeed, that in that case the administration here would not be general but *ad litem*. But in the first place it will be found, on inquiry, that there is no such thing as an administration *ad litem* known to the ecclesiastical court, excepting in the single case provided for by 38 Geo. 3, c. 87; and, secondly, even if there were a form of administration *ad litem*, the grant of such an administration would be involved in the general one, on the principle that *omne majus continet in se minus*.

With regard to the authorities that may appear adverse to the plaintiff, they merely shew that acts done under a valid foreign administration will be *upheld* in this country. Thus *Daniel v. Luker* (e) was the case of a release by an Irish administrator. The case in *Dalison*, 77, is the same as that in 1 Rolle's Abr. 908 (G.), and a mere *dictum* having no reference to an administrator plaintiff. The *dictum* of Sir Matthew Hale, reported by Levinz in *Shaw v. Stoughton* (f), and cited in the judgment of the Queen's Bench, was not intended to apply to such a case as this, nor was this point before the Court, as will be seen from the report of the same case in 3 Keble, 163. *Currie v. Bircham* (g) was a case of *respondeat superior*, like *Stephens v. Badcock* (h); and *Farrington v. Clerk* (i) turned on the agent's estoppel to

(a) 4 Hagg. 408.

(b) 4 Myl. & Cr. 76.

(c) 1 Hagg. 382.

(d) 1 Hagg. 549.

(e) Dyer, 305 a.


(f) 2 Lev. 86.

(g) 1 D. & R. 35.

(h) 3 B. & Ad. 354.

(i) 3 Doug. 124.

deny the title of his principal. With regard to *Huthwaite v. Phaire* (a) the real question there was, whether the plea pleaded was issuable, which it clearly was not; and the observations on this point were extra judicial. (The argument upon the form of the plea is omitted, as the judgment of the Court is confined to the question whether the plea was good in substance.)

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F. Pollock contra. The Archbishop of Canterbury has no jurisdiction to grant administration of goods in Ireland; such administration, therefore, does not enable the plaintiff to sue in respect of this indenture. This will clearly appear if the origin of the ordinary's jurisdiction, which is explained in *Hensloe's* case (b) and 2 Bl. Com. 494, be considered. Originally, says Sir Wm. Blackstone, the king, as *parens patriæ*, was entitled to seize upon the intestate's goods, and afterwards the king invested the prelates with this branch of the prerogative. "So that," says the same author, "properly the whole interest and power which were granted to the ordinary, were only those of being the king's almoner *within his diocese*." "And, as he had thus the disposition of intestate's effects, the probate of wills of course followed." Afterwards (p. 509) he observes, in speaking of the jurisdiction of the archbishop, where the deceased has *bona notabilia* in more than one diocese, "which prerogative (properly understood) is grounded upon this reasonable foundation, that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no others than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their own dioceses, beyond which their episcopal authority extends not." For the same reason the jurisdiction of the archbishop himself is limited to goods within his province. How

(a) 1 M. & Gr. 159.

(b) 9 Rep. 36 b.

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then can administration of the Archbishop of Canterbury be construed to extend to goods out of the realm? The very language of the letters of administration shews they can apply only to goods in different dioceses within his own province. It may be necessary, as was held in *Swift v. Swift (a)*, that the plaintiff should take out administration in the country in which he sues; but that is merely for the purpose of introducing him as a suitor, and does not shew that he must not also take out administration in the country where the goods of the deceased are situate for the purpose of acquiring a title to them. Although administration granted to the wrong person is voidable only, yet if granted by the wrong person it is altogether void; Bull. N. P. 141; *Gold v. Strode (b)*. This, and other cases also shew that the courts of law will always take cognisance of the limits by which the jurisdiction of the person granting administration is bounded; see per *Ayscough J. Y. B. 18 Hen. 6, f. 23: Blackborough v. Davis (c); Lysons v. Barrow (d); Allens v. Andrews (e); Bingham v. Smeatkwick (f); Price v. Simpson (g), (third point); Burston v. Ridley (h), recognised in Stokes v. Bate (i); Farrington v. Clerk (k). Daniel v. Luker (l)* was a similar case to the present, but the point was not decided. In *Attorney-General v. Diamond (m)* it was said by Lord Lyndhurst C. B. in delivering the judgment of the Court, "probate is not granted in respect of the assets generally, but in respect of such part of them as are, at the testator's death, within the jurisdiction of the spiritual judge by whom it is granted." *Shaw v. Stoughton (n)* is a direct authority for the defendant in error. "It was said by *Hale*, and not denied, that, if a

(a) 1 Ball & Beatty, 326.

(b) 3 Mod. 324; S. C. Carthew, 148.

(c) 1 P. Wms. 41.

(d) 2 Bing. N. C. 486; S. C. 2 Scott, 721.

(e) Cro. El. 283.

(f) Cro. El. 455.

(g) Cro. El. 718.

(h) 1 Salk. 39.

(i) 5 B. & C. 491; S. C. 8 D. & R. 247.


(k) 3 Doug. 124.

(l) 3 Dyer, 305. a.

(m) 1 C. & J. 370.

(n) 2 Lev. 86.

man die leaving goods in the several provinces of York and Canterbury, several administrations must be committed. And so it is of goods in England and Ireland." This indenture is to be accounted goods in Ireland; *Lunn v. Dodson* (a). In *Currie v. Birchem* (b) the widow of an intestate in India obtained administration to his effects in the Recorder's Court at Bombay, and remitted the proceeds of the effects to her agent in England. The plaintiff, who was a creditor of the intestate, took out letters of administration in England to the intestate, and brought an action against the widow's agent for money in his hands, part of the intestate's effects. It appears from the report of the argument and judgment that the principal point decided was, that the Indian letters of administration prevailed over those granted in England. It was said, in argument, "the letters granted in India could not prevail against those which had been granted to the plaintiff by the Prerogative Court." And it is said, in the judgment, "the wife of the intestate is entitled to all the effects of which her husband died possessed in India, by virtue of the letters of administration granted to her in that country." In *Huthwaite v. Phaire* (b) the question decided was, it is true, whether a plea was issuable or not, but the reason for the decision is directly in the defendant's favour. The case was covenant by an administrator, to whom letters had been granted by the Archbishop of Dublin, and the defendant pleaded that the deceased was an inhabitant of Dublin, and had bona notabilia within the diocese of the Bishop of London. *Tindal* C. J., after referring to *Com. Dig.* (B. 3) and 1 *Rolle* Abr. 908 (G.) 1, both of which are founded upon the case of *Shaw v. Stoughton*, already cited, proceeds thus:—"It is laid down in *Comyns* that, if a man have bona notabilia in Ireland and also in England, administration shall be granted by the Archbishop of Dublin for the goods in Ireland, and by the Archbishop of Canterbury for the goods in his pro-

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(a) 1 Roll. Abr. 908 (G.) 4. (b) 1 D. & R. 35. (c) 1 M. & Gr. 159.

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vince, &c. In order to make out that the letters of administration were improperly granted, the defendant should have alleged in his plea that the deed on which he is sued, at the time of *Driscoll's* decease, was bona notabilia within the province of Canterbury. The plea, however, merely states that *Driscoll*, before and at the time of his death, was an inhabitant of Dublin, and at his death had bona notabilia in the diocese of the Bishop of London. We, therefore, cannot assume that this very deed at the time of *Driscoll's* death was in London, and bona notabilia there."

J. W. Smith in reply. The case of the *Attorney-General v. Dimond* is distinguished by Lord Cottenham C. in *Tyler v. Bell (a)*. *Farrington v. Clerk* was a case of estoppel between principal and agent; and in *Currie v. Bircham* the point was that the action was brought against the agent instead of the principal. If the administration of the Archbishop of Canterbury is void in this case, there will be a failure of justice, for the 31 *Edw. 3*, st. 1, c. 11 does not extend to Ireland. The deed might at any time come into England. Why may it not be taken that administration was granted in England of that contingency?

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.—The question raised upon this record is whether the plaintiff below, to whom letters of administration had been granted by the Archbishop of Canterbury of the goods and chattels of one *Ellen Taylor*, an intestate, who died in Nova Scotia, can maintain an action against the defendant in an English court of law, upon a deed made with the intestate in her lifetime; it being averred in the defendant's plea "that such deed at the time of the death of the intestate was without the province of Canterbury, to wit, at Dublin, in

(a) 2 Myl. & Cr. 109.

the kingdom of Ireland, and that it was not then, at the time of the death of the intestate, to be administered within the diocese of Canterbury, but on the contrary thereof was then of the notable goods of the said *Ellen* to be administered within the kingdom of Ireland."

It is well established, that, in the case of a British subject dying intestate in the colonies or in foreign countries, a prerogative administration extends to all the personal property of the intestate wherever situate at the time of his death, whether in Great Britain, or in the colonies, or in any country abroad; and indeed from the late case of *Scarth v. The Bishop of London* (a) it appears that, where the intestate dies abroad, not having goods in divers dioceses in England, but only in the diocese of London, administration granted to such intestate, by the Consistory Court of the Bishop of London, will be equally effectual.

It is also well established, that, in order to sue in any court in this country, whether of law or equity, in respect of the personal rights or property of an intestate, the plaintiff must appear to have obtained letters of administration in the proper spiritual court of this country. (See the judgment of Sir *John Nicholl* in *Spratt v. Harris* (b); and see also the judgment of Lord Chancellor *Cottenham* in *Price v. Dewhurst* (c)). So that if the plaintiff in the case now before us had in the first instance taken out administration in the proper spiritual court in Ireland for the purpose of administering this deed, which was found in Ireland (as it is contended he ought to have done), he could not have sued in England upon such letters of administration, but must have also taken out administration in England from the proper spiritual court there. This latter point was expressly decided in *Carter v. Crost* (d), where the Court say, that an administrator made by an Irish bishop could not bring an action *here* as administrator.

The question, therefore, is reduced to this single point,

(a) 1 Hagg. 625.

(b) 4 Hagg. 485.

(c) 4 Mylne & Cr. 76.

(d) Godbold, 33.

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whether the plaintiff, suing a defendant in England in an English court of law, having clothed himself with a prerogative administration, must also shew, in addition thereto, that he has taken out letters of administration in the spiritual court of Ireland; or whether the bona notabilia found in Ireland are not in contemplation of law the same as if found in any other place out of the realm, as Scotland, for instance, or the colonies, or France, or any other foreign country.

And we think no difference can exist in point of law whether the suit relates to assets of such intestate which are found in Ireland at the time of his death, or in any foreign country.

Before the union of Great Britain with Ireland, Ireland was to many purposes considered as a foreign country. It was beyond the seas, within the meaning of the Statute of Limitations (a). It was beyond the seas with respect to the exceptions of disabilities under the statutes relating to fines, the expression "beyond the seas" being used as synonymous with the expression "out of the realm," in the statutes relating to fines (b). There never was, in fact, any more connection between the Courts of Westminster Hall and the Ecclesiastical Courts of Ireland, than between those Courts and the Ecclesiastical Courts of any foreign country. No prohibition ever lay from any of the English courts of law; no certificates from the bishops of Ireland were ever receivable here. And that the union of the two kingdoms has made no difference in this respect, will appear sufficiently from the judgment of the Court of Common Pleas in the case of *Battersby v. Kirk* (c), where it was held that in the Bristol Dock Act, passed since the union, Ireland was still, notwithstanding the union, to be considered in parts beyond the seas.

Unless, therefore, some direct authority could be produced upon this point, we see no ground or principle for

(a) 21 Jac. 1, c. 16.

c. 24, s. 5.

(b) 18 Edw. 1. st. 4, & 4 Hen. 7,

(c) 3 Scott's Rep. 11.

holding the Irish administration to be necessary in the English courts. But no such authority has been cited. The case of *Shaw v. Stoughton* (a), upon which reliance appears to have been placed, does not appear to us to bear out the proposition contended for by the defendant below. In one sense indeed it is properly laid down in that case that, under the circumstances therein supposed, several administrations must be committed, one for the goods in England, another for the goods in Ireland: for no administrator could sue in the English courts, in respect of the personal estate, wherever it was found at the death of the intestate, without an English administration: nor again could any administrator sue in the courts of Ireland without an Irish administration: and in that sense, and to that extent, it is true, there must be two administrations: but, supposing the Irish debtor to come within the jurisdiction of the English courts, whether the administrator under a prerogative administration in England must take out letters of administration in Ireland also, to enable him to sue in England, because the debt due from the defendant was bona notabilia in Ireland, is a point on which the case cited furnishes no decision. Upon the authority of that case indeed, if the administrator under an Irish administration had received this debt and given a release for it, it would have been a bar to any demand on the part of the administrator in England, as is laid down in *Dalison* 76, fol. 5; but, not having done so, the question is still open whether the administrator under the English letters of administration can recover the debt. And upon the general ground, before stated, that the assets in any diocese in Ireland are to be considered as assets abroad, when the administrator sues in an English court, under a prerogative administration, we think the plea is bad, and consequently that the judgment of the Court below should be reversed.

D.

Judgment reversed.

(a) 2 Lev. 86.

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In order, under the stat. 7 G. 4, c. 46, s. 13, to take out execution against members of a joint stock bank upon a judgment against a public officer, it is necessary to proceed against them by *scire facias*.

A suggestion only having been entered for that purpose, the Exchequer Chamber reversed so much of the judgment of the Court below as related to the award of execution.

RANSFORD, Public Officer, &c. v. BOSANQUET and others.

WRIT of error, brought upon a judgment of the Court of Queen's Bench. Judgment for the plaintiff in an action of *assumpsit*, brought by the defendants in error against the plaintiff in error, as one of the public officers of the *Leamington bank*, upon a promissory note. On the record there was a suggestion that *John Burnett* (and others who were named) were before and at the time of the giving of the said judgment and still are members of the said society or copartners thereof. The entry on the record then proceeded, "and hereupon the plaintiffs (below) pray that execution may be awarded to them on the said judgment against the said *John Burnett* (and others), and it is granted to them accordingly returnable" &c.

Burnett and the others brought their writ of error, assigning as causes of error that judgment was given and execution awarded against them without their appearing in the Court below, or being summoned to appear there, or having any notice of the said proceedings or opportunity of disputing the same, wherefore the said *Burnett* (and others) prayed that the judgment and award of execution might be reversed.

To this assignment of errors, the defendants in error pleaded, that after the judgment and before the award of execution against the said *Burnett &c.*, the Court below granted a rule calling upon the defendant (below) to shew cause why the plaintiffs (below) should not have leave to enter a suggestion on the judgment roll of the fact of *Burnett &c.*, being members of the said society or copartnership, upon notice of the said rule to be given to the said *Burnett* (and others); that notice was given to them, and that the rule was afterwards made absolute.

The points stated for argument by the plaintiffs in error were, that the judgment and execution were erroneous, inasmuch as there was no *scire facias*, nor were the plain-

tiffs in error legally called upon to oppose such execution, also that the plea was bad in alleging matters of practice only, and on other special grounds(a).

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*Cowling*, for the plaintiffs in error, cited the three cases decided, one in each of the three superior Courts at Westminster, that a scire facias was a necessary proceeding before awarding execution. — *Ransford v. Bosanquet* (b), *Whittenbury v. Law* (c), and *Cross v. Law* (d). (*Alderson B.* mentioned *Harwood v. Law* (e)).

*Butt*, who was called on by the Court, adverted to the distinction between introducing new parties, and merely stating some alteration in the record affecting those already parties on it. He conceded that, after the cases cited, he could not contend that a suggestion was sufficient to charge new parties.

The COURT (f) expressed their opinion that there could be no doubt that a scire facias was the proper course, and gave judgment reversing so much (g) of the judgment below as related to the award of execution.

Judgment accordingly.

(a) It was objected that the plea had neither a proper commencement or conclusion. *Street v. Hopkinson*, Cases B. R. Hardw. 345; S. C. 2 Str. 1055 was cited.

(b) 3 P. & D. 998.

(c) 6 Bing. N. C. 345; S. C. 8 Scott, 661.

(d) 6 M. & W. 217.

(e) 7 M. & W. 203.

(f) *Tindal C. J.*, *Erskine* and *Maule Js.* and *Parke*, *Alderson*, *Gurney* and *Rolfe Bs.*

(g) See *Street v. Hopkinson*, Cases B. R. Hardw. 345; S. C. 2 Str. 1055.

G.



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Case by a reversioner against a Railway Company for entering and making a railway on his land.

Plea, that, before the reversion of the plaintiff, the

dean and chapter of Durham were seised in fee, and by indenture between them and the plaintiff demised to the plaintiff the lands in question for a term "excepting and reserving the mines under the same, with power to dig, win and carry away the said mines, with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon ways in and over the last mentioned premises or any part thereof." The defendants then justified the making the railway as the servants of the dean and chapter, and by their authority.

Replication, (admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and that he had no other title except under such demise), *de injuriâ &c.* Issue thereon.

On the trial it appeared that the Railway Company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, and authorising the Company to make such a railway for the conveyance of *passengers*, goods, *coals*, wares and merchandize. The railway was constructed for the purpose of conveying general goods and passengers as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of the coals likely to be sent along it from the country with which it communicated.

The judge directed the jury that, if they thought the railway was made for other purposes *as well as* for the carriage of coals, the plaintiff was entitled to their verdict.

*Held*, 1. That, if the railway was such a railway as the Company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the Company also to use the railway for other purposes for which they had no right to use it, and that the direction of the judge was wrong.

2. That the proper construction of the exception clause in the indenture of demise by the dean and chapter to the plaintiff was, that the clause gave the dean and chapter, not a general power of making ways and granting way-leaves for all purposes, but for the limited purpose only of getting the excepted minerals.

That the right possessed by the dean and chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted, nor of a reservation, as it did not issue out of the thing granted, but that it was an easement newly created by way of grant from the lessee, and that it was to be taken that the lease was executed by the lessee, although it was not stated to be so.

That the proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether at the time when the road was made it had become necessary or expedient for the Company to make a road for the purpose of getting the excepted minerals, and if so, whether the road actually made was a proper road for that purpose, assuming it would be used for no other purpose.

**THE DURHAM AND SUNDERLAND RAILWAY COMPANY  
and T. E. and S. FORSTER v. THOMAS WALKER.**

**ERROR** from the Queen's Bench on a bill of exceptions. Case by reversioner. *Walker* the plaintiff (below) stated in his declaration, that certain lands situate in Pittington, in the county of Durham, were in the possession of certain tenants thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff, yet the defendants wrongfully and injuriously intending to injure

the plaintiff in his reversionary interest in the lands, whilst they were in possession of his tenants, and whilst the plaintiff was so interested therein, to wit, on the 1st July, 1836, wrongfully and injuriously &c., entered and dug and excavated &c.

Pleas, 1, not guilty.

2. Traversing that the lands were in the possession of the plaintiff's tenants, and the plaintiff's reversion.

3. A traverse of any injury to the plaintiff's reversion.

4. Leave and licence.

5. That before the supposed reversion in the declaration mentioned of the lands therein mentioned, or any of them, or any part thereof, belonged to the plaintiff, and before and at the time of making the indenture hereinafter in this plea mentioned, the dean and chapter of Durham cathedral were and from thence hitherto have been and still are seised of the said lands in the said declaration mentioned in their demesne as of fee, and, being so seised thereof, heretofore, and before the reversion belonged to the plaintiff, and before any of the times when &c., to wit, on the 28th day of September, 1832, by a certain indenture then made between the dean and chapter of the one part, and the plaintiff of the other part, and which indenture was then sealed with the chapter seal of the said dean and chapter, the said dean and chapter for them and their successors did demise unto the said *William Walker*, (the plaintiff below,) his executors, administrators and assigns, amongst other things, the lands in the declaration mentioned, *excepting and reserving* the woods, underwoods, and trees then growing or thereafter to grow upon the demised premises, and the mines, quarries and seams of clay within and under the same, with full and free authority and power to cut down, take and carry away the said wood and trees, and to dig, win, work, get and carry away the said mines, quarries and seams of clay, *with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all*

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*necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon way and waggon ways in and over the last mentioned premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the dean and chapter, their successors, grantees or assignees, to have and to hold the premises by the said indenture demised (except as in the said indenture excepted) unto the said William Walker, his executors, administrators and assigns, from the second day of September then instant, unto the full end and term and during all the whole term of twenty one years thenceforth next and immediately following, fully to be complete, ended and run, yielding and paying therefore as in the indenture is mentioned.*

That the plaintiff, by virtue of the said demise, afterwards, to wit, on the 3rd day of September, in the year last aforesaid, entered into and upon the said demised premises, and became and was thereof possessed for the said term so to him thereof granted as aforesaid. That the plaintiff from the commencement of the term by the indenture granted, hitherto and during all the time that the supposed reversion in the declaration mentioned belonged to him as therein also mentioned, was entitled to the lands in the declaration mentioned, under and by virtue of the said indenture, and not otherwise, and had no right or title to, or estate or interest in the same, otherwise than and except under and by virtue of the said indenture. That after the making of the indenture and during the term thereby granted, on the said days in the declaration mentioned, when &c., the defendants (below), as the servants and by the command of the dean and chapter, entered into and upon the lands in the declaration mentioned, and in which &c., for the purpose of forming and making, and then formed and made, in and upon and over the same lands, a certain road or way, being

and which was such a road or way as within the intent and meaning, could and might be made by virtue and in pursuance of the exceptions and reservations in that behalf contained in the indenture. That continually from the time of making the road or way so made as aforesaid hitherto the dean and chapter were ready, and after the time of making the last mentioned road or way, and the committing of the supposed grievances in the declaration mentioned, and before the commencement of this suit, to wit, on the 20th day of July, 1836, tendered and offered to the plaintiff to pay him according to the last mentioned indenture in that behalf reasonable damages for spoil of ground done by means of the premises in this plea mentioned, upon the adjudication of two indifferent persons to be chosen by the parties according to the said indenture in that behalf, and then requested the plaintiff together and along with the dean and chapter to choose and appoint two indifferent persons to make an adjudication in that behalf, but that the plaintiff then wholly refused to accept the same, or to choose or appoint any such indifferent person or persons for the purpose of making an adjudication in that behalf. That for the purpose of and in forming and making the road or way so formed and made as aforesaid, the defendants, as the servants and by the command of the said dean and chapter at the times when &c., in the declaration mentioned, necessarily and unavoidably entered the lands in which &c., and dug and excavated &c.

That by means of the premises in the plea mentioned, and not otherwise, the plaintiff was injured in his reversionary estate, which are the same supposed grievances in the declaration mentioned &c.

Replication. Issue joined on the three first pleas.

To the fourth plea, *de injuriâ*, &c. Issue thereon.

To the fifth plea: that though true it is that the dean and chapter were seised in fee of the lands in the declaration mentioned as in the fifth plea is mentioned, and that the indenture above mentioned was made as in the fifth

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plea is stated, and that the plaintiff had not and hath not any right or title to the lands in the declaration mentioned, except under and by virtue of the indenture in the fifth plea mentioned, for replication, nevertheless, *de injuriâ*, &c. Issue thereon.

The bill of exceptions stated that the case was tried before *Coltman J.*, at the Durham summer assizes, 1837. The plaintiff (below) gave in evidence a lease from the dean and chapter to himself of the 28th September, 1832, being the same lease as that mentioned in the last plea, whereby the dean and chapter demised to him (the plaintiff, *Walker*) the lands in the declaration mentioned for twenty-one years, from the 2d September, 1832, and which indenture contained the exception as set out in the fifth plea.

The bill of exceptions also set out a memorandum, reciting that the trustees of the Marquis of *Londonderry* had taken of *Walker* (the plaintiff below) the lands in the declaration mentioned for a term of nine years from the 18th October, 1834, also a notice from *Walker* to the Durham and Sunderland Railway Company to stop their works on the lands in question, until an arrangement for compensation had been come to.

The plaintiff proved that the *Forsters*, as the engineers of the Durham and Sunderland Railway Company, had entered upon the land in the occupation of the trustees of the Marquis of *Londonderry* as his tenants, and made embankments for the purpose of forming a railway thereon; that the railway in that part of it was in an unfinished state, and had not been used, but that, from a point further from Durham and nearer to Sunderland than the plaintiff's land, the railway was finished down to Sunderland, and that a coach conveying passengers travelled daily all along such finished part of the railway.

The defendants relied upon the act incorporating the Company, the 4 & 5 *Will. 4*, c. xcvi. (local, personal and public), intituled "An Act for incorporating certain Persons for the Carriage of Goods and Commodities by means of a

Railway from the city of Durham to Sunderland near the Sea, with a Branch to join the Hartlepool Railway, in the Township of Haswell, all in the County of Durham," by one clause of which the Company were authorised to contract with any ecclesiastical corporation for leases to the Company, for any term not exceeding ninety-nine years, of any tenements within (amongst other places) the parish of Pitlington aforesaid, where the lands of the plaintiff were situated. They also gave in evidence an indenture of the 21st March, 1835, by which the dean and chapter of Durham did demise and confirm unto the Durham and Sunderland Railway Company full and free liberty, power and authority, to enter upon (amongst other lands) the lands demised to the plaintiff, and to make thereon one double main road or way, as therein described, and from time to time to alter, change or divert the same main road or way, as occasion should require, or the Company should think proper or deem expedient or more convenient, with the consent of the dean and chapter; and also full power and authority to use and to grant and authorise the use of the roads or ways and premises thereby demised for the conveyance of passengers, coals, goods, wares, merchandise, and other commodities, by any mode of conveyance whatsoever, whether of present use or future invention. They then gave evidence as to the compensation offered by them for spoil of ground, and that the railway of the Company then in progress over the plaintiff's land was well calculated for carrying on a traffic in coals from several collieries to the westward in the county of Durham, and that in that part of the county there were extensive coal fields, and that the railway was properly formed for carrying coals from those districts down to the sea; that there would be an ample traffic, for the railway was a double line, and a double line was absolutely necessary for the conveyance of coals from that district; that the same line which would carry coal waggons would also convey passengers or waggons with goods, and that, if the railway were completed, and

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passengers were also carried upon it, this would increase the wear and tear of the rails, but that there would be no other difference.

The learned judge left the question to the jury, whether or not the said railway was made and constructed over the land of the plaintiff for other purposes than the conveyance of coals and other minerals, and did then and there declare and deliver his opinion to the jury on the said trial, that if they found that the railroad so made on the said land of the plaintiff was made for other purposes as well as for the carriage of coals or other minerals, it was not such a road as could or might be made by virtue and in pursuance of the said exceptions and reservations contained in the said indenture, notwithstanding the form and structure of the railway was fit and proper for the carriage of coals and minerals, and thereupon the said justice then and there directed the jury to find their verdict for the plaintiff on the said last issue, if, upon the evidence adduced on the said trial, they thought that the said railway was *so made for the purpose of carrying passengers and goods as well as for the carriage of coals and minerals.*

Exception: "that the direction of the justice was erroneous, and that he ought to have declared his opinion to the jury that, if the form and construction of the said railroad, so made on the land of the said *Wm. Walker*, were fit and proper for the carriage of coals and other minerals, it was such a railroad as could and might be made by virtue and in pursuance of the said exceptions and reservations contained in the said indenture, and with that declaration of his opinion and direction ought to have directed the verdict for the plaintiff on all the issues."

The case was argued in last Michaelmas Vacation (Nov. 29), before *Tindal C. J.*, *Coltman* and *Maule* Js., Lord *Abinger* C. B., and *Parke* and *Rolfe* Bs.

*Addison*, for the plaintiff in error. The learned judge misdirected the jury in telling them to find for the defend-

ant if they thought that the railway was made for the carriage of passengers and goods as well as for the carriage of coals and minerals. For, first, the dean and chapter, in the indenture of demise to the plaintiff, had reserved themselves full power to grant way-leaves for all purposes. 2. Even if they could grant way-leaves for the carriage of coals and minerals only, still, if the railway, for the making of which this action is brought, was made for the carriage of coals and minerals, and was properly constructed for that purpose, it was a railway authorised by the indenture; notwithstanding that it might be intended to use the way for the carriage of other things also.

1. There is nothing in the clause, by which the minerals are excepted to the dean and chapter, the lessors, to restrict their power of granting ways merely for the purpose of getting the minerals excepted, for the power of granting way-leaves is "for the purposes aforesaid," and the purposes aforesaid are "to and from the same, or to or from any *other* mines, quarries," &c. This power, which the lessors have reserved, is not legally a reservation; "for it is not any new thing reserved out of that which they had granted before;" nor is it legally an exception, for "it is not part of the thing granted, and of a thing in esse at the time:" *Shepp. Touch.* 80; *Wickham v. Hawker* (a), *Doe d. Douglas v. Lock* (b). It is properly a grant by the lessee to the lessors; and, as a grant, is to be taken most strongly against the grantor.

2. But, even if the clause is to be limited to ways made for the purpose of carrying minerals, the direction was wrong; because, if the railway was fit for that purpose, the intention to use it for another purpose would not make the defendants wrong-doers. An illegal intention or claim at the time of executing a legal authority will not prejudice: *The Governor, &c. of the Poor of Bristol v. Wait* (c), *Bless-*

(a) 7 M. &amp; W. 63.

(c) 1 A. &amp; E. 264; S. C. 3 N.

(b) 2 A. &amp; E. 705; S. C. 4 N. &amp; M. 359.

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*ley v. Sloman (a)*, *Shorland v. Govett (b)*. "I take it to be perfectly clear and settled law, that if a man has a legal authority, by writ or otherwise, to do all that he does, it is quite immaterial whether he intends to use that authority or not, or even declares that he does not intend to use it. If he is authorised by a writ, or in any way, to do a particular thing, and he does it in the manner in which he is authorised, he does it by authority of the writ, or, which is the same thing, 'under and by virtue or by force' of the writ:" per *Parke J.* in *Lucas v. Nockells (c)*. Whatever may have been the intention, the railway has never actually been used for the purposes said to be illegal.

Even if a mere illegal intention could make the defendants wrong-doers, the plaintiff should have new assigned, instead of replying *de injuriâ*, &c.: *Mellor v. Walker (d)*. "It is quite clear that all acts done, which make the party unjustifiable under the authority of the law, and a trespasser *ab initio*, cannot be given in evidence under the general traverse, but must be specially replied:" per *Parke J.* in *Lucas v. Nockells (e)*.

*W. H. Watson* *contrâ*. The clause in question admits of four different constructions. That the deed gives the dean and chapter power to make ways and grant way-leaves—

1. For the purpose of getting the excepted minerals:
2. For the purpose of carrying their own minerals, although the produce of other mines belonging to themselves, and not of the excepted mines:
3. For the purpose of carrying minerals from any mines whatsoever:
4. For any purpose whatsoever.

It is submitted for the defendant in error that the first is the right construction.

(a) 3 M. & W. 40.

(b) 5 B. & C. 485; S. C. 8 D.  
 & R. 257.

(c) 10 Bing. 171.

(d) 2 Wms. Saund. 5 e, (end of  
 note (S)).

(e) 10 Bing. 176.

The clause is to be construed as an exception. The minerals are excepted, and what follows is merely by way of accessory to the exception. The clause cannot be treated as a grant by the lessee, for it does not appear that the lessee executed the indenture; and the privilege claimed cannot be created except by deed: Year Book, *Hen.* 7, fol. 86, cited in *Wickham v. Hawker* (a); *Hewlins v. Shipham* (b). Treating the clause therefore as an exception, it is to be construed against the lessor. "Every reservation and exception shall be taken strictly against the lessor, and beneficially to the lessee, because every reservation charges and encumbers the land demised; and the words of reservation are the words of the lessor, and the reservation is his act, and therefore shall not be extended beyond the words:" *Lofield's case* (c); *Shepp. Touch.* 100; *Earl of Cardigan v. Armitage* (d); *Bullen v. Denning* (e). Another rule also may be applied in the construction of this deed: "Wheresoever the words of a deed, or of a party without deed, may have a double intendment, and the one stands with law and right, and the other is wrongful and against it, the intendment that stands with law shall be taken:" *Co. Litt.* 42 a, 183 b.

1. The true construction is, that the lessor reserved to himself a right of way and of granting way-leaves, for the limited purpose of getting the excepted minerals. The substance of the exception is the minerals, and what follows is merely subservient to the purpose of getting them, viz. "with,"—not "and"—"to or from the same, or to or from any other mines, &c. and also all necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon ways in and over the last-mentioned premises, or any part thereof," &c. The words "purposes aforesaid" govern the whole clause. What are the pur-

(a) 7 M. &amp; W. 79.

(d) 2 B. &amp; C. 307; S. C. 3 D.

(b) 5 B. &amp; C. 232; S. C. 7 D.

&amp; R. 414.

&amp; R. 783.

(e) 5 B. &amp; C. 842; S. C. 8 D.

(c) 10 Rep. 106 b.

&amp; R. 657.

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poses aforesaid? The getting at the excepted minerals. In *Dand v. Kingscote* (a) a similar point was considered.

2. If the way-leave is irrespective of the particular minerals excepted, it must at least be confined to other lands of the dean and chapter. A way-leave over the land of another, and not to or from the land of the claimant, but altogether irrespective of it, and not defined as to the locus à quo and ad quem, is not favoured by law: Y. B. 21 *Edw. 3*, fol. 2, pl. 5: *Fitz. Nat. B.* (b), 183, N, and note (a); *Br. Ab. Chimyne*, pl. 7; *Godley v. Frith* (c), *Alban v. Brounsall* (d), *Burton's Real Property*, 432 (e). Such a way in gross, it seems, is merely personal to the grantee, and does not extend to his servants: *Wickham v. Hawker* (f).

3. At all events the clause extends to lands ejusdem generis with the lands demised, that is to mineral lands. This was the construction put by the Vice-Chancellor upon a clause identical with the present in *Farrow v. Vansittart and others and the Dean and Chapter of Durham* (g). There, the Vice-Chancellor, in granting an injunction to restrain the dean and chapter, who were the plaintiff's lessors, and the other defendants, who were the licencees of the dean and chapter, from proceeding to make, on the lands demised, a railway for the purpose of conveying passengers and general merchandise, made the following observations: "Now the purposes aforesaid are those of carrying away the wood and trees and the produce of the mines, quarries and seams of coal, and having ingress, egress and regress, and passage to and from the same, that is, from the places where the mines may be situate. It is obvious to me that the dean and chapter did not intend to reserve to themselves the unlimited right of making roads and ways of any description, and in any direction, for all purposes whatever, but that the power of making ways, which is

(a) 6 M. & W. 174.

(b) 9th ed.

(c) Yelv. 159.

(d) Yelv. 163.

(e) 5th ed.

(f) 7 M. & W. 78.

(g) 1 Railway Cases, 602.

reserved, is a power with reference to what precedes it, namely, that of going to and from their own mines, including the case of mines of other persons, as to which it might be advantageous to them to give a passage for the coals and minerals of those persons over their own lands. That such was the meaning of the reservation clause I can well understand: but it is clearly not, as it appears to me, a power reserved of making ways generally; and, if they had intended to reserve to themselves the more extensive power, it would have been easy to have expressed that in unambiguous language. 'That has not been done.' And the Lord Chancellor appears to have been of the same opinion with the Vice Chancellor.

4. The remaining construction, that the dean and chapter reserved to themselves and their grantees a way over the demised lands for all purposes whatsoever, would destroy the subject-matter of the demise. The application of land to a railway amounts to an ouster of any previous occupier, *Doe d. Wawn v. Horn(a)*. The Court will not construe the reservation so as to lead to such a result. There are analogous authorities as to rights of common, where the Court has refused to suppose a reservation by the lord of a power which would enable him to annihilate the tenant's right of common: *Badger v. Ford(b)*, *Arlett v. Ellis(c)*.

If any one of the three first constructions is right, the summing up of the learned judge was right. It was not shewn that the railway was made for the purpose of going to or from any mine, or that there was any coal or other mineral which could be gotten, or that the railway was necessary for the above purposes. In *Dand v. Kingscote(d)* the plaintiff succeeded on the third plea, because the allegation that the way in question was convenient and necessary, *at the time when it was made*, was not proved. If this plea involves the same allegation, it was not proved; if it

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(a) 3 M. & W. 333, and 5 M. & W. 564.

(b) 3 B. & Ald. 153.

(c) 7 B. & C. 346; S. C. 9 D. & R. 897.

(d) 6 M. & W. 174.

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does not, it is a bad plea. It is not contended that the Company must have actually got the coal before the railway could be made, but there must be at least the opportunity of getting it. The direction of the learned judge was right also with reference to the words in the plea, that the railway was "*such a way*" as might be made within the reservation, for, if it was a railway for the double purpose of carrying passengers as well as minerals, it was not such a way. This again leads to another objection to the plea, for the allegation that the way was "*such a way*" as might be made, does not amount to more than an allegation that the way was "*similar*" to a way within the reservation.

It was not necessary for the plaintiff to new assign. The way set up is a way for the double purpose of carrying coals and passengers, and the plaintiff by his replication denies the right to such a way, for he denies that the way made was within the exception, and the plea may be treated as if, instead of saying the way made was within the exception, it had said that the way made was for coals and passengers. In *Cowling v. Higginson* (a), to a declaration in trespass, there was a plea of a right of way for certain occupiers to pass with carriages, &c. at their pleasure, and the replication traversed the right, and it was held that the plaintiff might shew that the defendant had a right of way for carriages for certain purposes only, and not for all, and that he was not compelled to new assign. The defendant in this case had to establish the right to make a way for all the purposes for which it was made. He cited also *Jackson v. Stacey* (b), *Drewell v. Towler* (c), *Marquis of Stafford v. Coyney* (d).

*Addison* in reply. As to the objection that the lessee does not appear to have sealed, and therefore that the way-leave cannot be treated as a grant by the lessee, the objection is cured by the pleading over and the verdict: *Vivian*

(a) 4 M. & W. 245.

(b) Holt, N. P. 455.

(c) 3 B. & Ad. 735.

(d) 7 B. & C. 257.

*v. Champion* (a); and the lessee, who has assented to the deed, would be bound though he had not sealed: *Com. Dig. Fait*, (C 2).

The old cases cited to shew that a man cannot have a way in gross, merely shew that he could not have the particular remedies by assise of nuisance, or a quod permittat prosteruere for an obstruction to it. In *Farrow v. Vansittart* (b), the Lord Chancellor declined to give any opinion on the construction of this clause, saying it was for a court of law.

The objections to the plea are, if good, a ground for special demurrer only.

*Cur. adv. vult.*

TINDAL C. J. now delivered the judgment of the Court as follows:—This was an action on the case, brought by *Wm. Walker* (the defendant in error) against the Durham and Sunderland Railway Company, and two of their servants, wherein he complained of an injury to his reversionary interest in certain lands at Pittington, in the county of Durham, in the possession of his tenants, by reason of the Company having cut and formed a railway through those lands.

The defendants below pleaded, by way of justification, that the dean and chapter of Durham being seised in fee of the lands in question, by an indenture of lease, dated the 28th day of September, 1832, demised the same to the plaintiff below for a term of twenty-one years, from the 2d day of September then instant, subject to certain yearly rents thereby reserved, and with an exception and reservation of the mines and minerals, and of certain rights of way, and of granting way leave, which, on the part of the plaintiffs in error, it was contended, enabled the dean and chapter to authorise them to make the railway in question. The plea then avers that the plaintiff has no title to the land, except under that demise, and goes on to state that the

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(a) 2 *Ld. Raym.* 1125.

(b) 1 *Railway Cases*, 602.

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defendants, the *Forsters*, as the servants of the dean and chapter, and by their authority, entered upon the lands and formed the railway across the same, such railway being a way which, under the exception and reservation contained in the deed, the dean and chapter had power to make.

To this plea the plaintiff, admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and admitting that he had no title except as lessee under that demise, replied “*de injuriâ absque residuo causæ.*”

The cause was tried before Mr. Justice *Coltman*, at the Durham summer assizes, 1837. On the trial the plaintiff gave in evidence, amongst other things, the lease set out in the plea, and the exception and reservation, on which the Company relied, appeared to be in the following words. (His lordship then read the exception.)

The defendants then gave in evidence a deed under the seal of the dean and chapter, authorising them to make a double line of railway across the lands in question, and to use the same for the conveyance of passengers, goods, coals, wares and merchandise, and it was proved that, in pursuance of that authority, the Company had formed a double line of railway through a very considerable line of country, including the lands in question.

Evidence was given, on the part of the plaintiff, to shew that the railway was constructed for the purpose of being used for the conveyance of goods and passengers as well as of coals and minerals; and on the part of the defendants, to shew that the railway was not more than was necessary for the carriage of the coals and minerals likely to be sent along it from the western part of the county, with which it communicated.

Upon this evidence the learned judge declared his opinion to the jury, that, if the railway was made for other purposes *as well as* for the carriage of coals and minerals, it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of demise; and he directed them that, if they thought the

railway was so made for such other purposes *as well as* for the carriage of coals and minerals, then they ought to find a verdict for the plaintiff.

To this direction the counsel for the defendants excepted, and the question for our decision is, whether the direction of the learned judge was right. And we think it was not.

The injury of which the plaintiff complains is not a trespass affecting his possession of the land in question, for he is not in possession at all; but it is the injury to the inheritance occasioned by the defendants having, as he alleges, wrongfully made, across the lands of his tenants, a railway, which they, the defendants, were not warranted in making, thereby lessening the value of his reversion. Now if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make, for the purpose for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenants in possession to maintain an action of trespass, but the mere intention to commit such a trespass is no injury to the reversioner, and we therefore think that the direction of the learned judge was incorrect.

The proper question for the jury, as it appears to us, was, not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time when it was made, it was reasonable and proper to make for the purposes for which it was lawful to make it, and for those purposes only.

This being so, it follows of necessity that a venire de novo must be awarded.

But it would be a very unsatisfactory decision of this case, if we were simply to award a venire de novo, without at the same time declaring our construction of the deed as to the purposes for which the dean and chapter, or those who claim under them, are thereby authorised to make a railway.

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That is a question of law to be decided by the Court, after the decision of which there can be no difficulty in putting the case properly before the jury.

Now on the argument of this case, four different constructions of the clause in question were suggested:

*First*, it was said that the meaning was to reserve to the dean and chapter an unlimited power of granting way-leaves, over all or any part of the lands demised, without any restriction whatever as to the uses to which the ways should be applied.

*Secondly*, if that were considered too wide a construction, then it was contended that the clause authorised the granting of way-leaves for the purpose of carrying coals and minerals from whatever mines they might have been raised and gotten.

*Thirdly*, it was argued that at all events the dean and chapter had, under the reservation, the power of granting way-leaves for the transport of their own mines and minerals, whether raised from under the lands demised or from under any other lands.

And *fourthly*, it was contended that the deed in fact gives no power to the dean and chapter, except that of making ways, and granting way-leaves for the purpose of getting the coal and minerals excepted in the demise.

The important question for our decision is, which of these constructions ought to be adopted, and we are all of opinion that the fourth, which is the most limited construction, is the correct one, and that the only right reserved to the dean and chapter under the clause in question, is that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted wood, mines and minerals.

The exception is of "*all woods, underwoods and trees, growing or to grow on the demised premises, and of all mines, minerals and seams of clay within and under the same, with full power to cut down and carry away the trees, and to dig, win and carry away the mines, quarries, and seams of clay,*

*with free ingress, egress and regress way-leave and passage to and from the same."* If the words of the exception had stopped here, it would have been quite clear that the right of way intended was only a right of way for the purpose of getting the trees and minerals excepted. It would in truth have been like the words immediately preceding, viz. "*with power to dig, win, get and carry away*" nothing more than what the law would, if necessary, have given as incident to the exception, a right of passing to and fro for the purpose of making the exception available. But the language of the exception goes on further, viz. "*or to or from any other mines, quarries, seams of clay, lands and grounds, on foot or on horseback &c., and also all necessary and convenient ways, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon ways in and over the said premises or any part thereof &c.*"

These are the words which create the doubt. Are they introduced for the purpose of securing to the dean and chapter a general right of way and of granting way-leaves over the demised lands for purposes other than that of getting the matters excepted, or are they confined to that object alone? We have already stated that we think they are confined to the latter object.

The things excepted are the trees and minerals, and we consider all which follows as mere accessaries to the exception. The word "*with*" must be taken to mean "*and as incident thereto,*" so that the passage must be read as if it was framed thus:—*Excepting the trees, mines and minerals and, as incident thereto, full power to cut down &c. the trees, and dig, work, and carry away the mines &c. and, as incident to such digging &c. free ingress, way-leave &c. to and from the lands demised, and to and from any other lands and grounds. And also all convenient ways, privileges and powers whatever for the purposes aforesaid, (i. e. for the purpose of getting the excepted trees, mines and minerals,) and particularly the power of making and granting ways and way-leaves for those purposes.* Neither the way-

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leave to and from the mines, in and under the lands demised, nor the way-leave to and from other lands and grounds, purports to be excepted or reserved as a distinct matter of exception or reservation. Both the one and the other are mentioned in connection with the mines excepted, and in no other manner whatever. The right of way to *other lands and grounds* is connected with the right of way to the mines &c. reserved only by the disjunction "or"—*excepting mines &c. with a right of way to and from any other lands and grounds*. If the intention had been to reserve to the dean and chapter a right of way, and still more a right of granting way-leaves, independently of the right to get the excepted trees and mines, such a right would surely have been treated as a separate matter unconnected with the previous exception, more particularly being, as it was stated to us in the argument to be, a right of the greatest value and importance. There is nothing unreasonable in supposing that the lessors meant to reserve to themselves a right of getting the excepted mines and materials by means either of shafts and pits to be sunk on the demised premises, or if it should be more convenient by means of shafts or pits already sunk or to be sunk on adjoining lands, and, if such was the intention, the language of the deed is perfectly well adapted to carry it into effect.

It is to be observed, that a right of way can not in strictness be made the subject either of exception or reservation. It is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception, and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, as in the present case, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same manner as a right of sporting or fishing, which has lately been much considered in the cases of *Doe d. Douglas v. Lock* (a) and *Wickham v. Hawker* (b).

(a) 2 Ad. & El. 705; S. C. 4 N. & M. 807. (b) 7 Mee. & Wel. 63.

It is not, indeed, stated in this case that the lease was executed by the lessee, which would be essential in order to establish the easement claimed by the lessors as in the nature of a grant from the lessee; but we presume that, in fact, the deed was according to the ordinary practice executed by both parties, lessee as well as lessors.

It was pressed in the argument, on behalf of the plaintiffs in error, that general wayleaves or powers of granting rights of way over lands demised, as easements reserved to grantors or lessors, are so very usual in the north of England, and often constitute so very valuable a property, that the Court will so construe the reservation as to carry out this presumable intention.

But to this we can not accede. Indeed, if we were to hazard a conjecture on this subject, we should be strongly disposed to think that the words in the present lease, and which it was suggested are the same as occur generally in leases from the dean and chapter, were probably first introduced long ago, before the great importance of wayleaves had been fully felt or understood either by grantors or grantees, and when really nothing more was thought of than the subject-matter actually excepted, and what was necessary for the purpose of making that available, and that the same words have been subsequently retained without much attention to their precise import.

Be that, however, as it may, we are clearly of opinion that the ways referred to in the exception in this case are confined to ways necessary or proper for enabling the lessors to get the matter excepted, and in like manner that the powers mentioned in the latter part of the exception, and particularly the power of granting rights of way, are powers which can only be exercised "*for the purposes aforesaid*," i. e. for the purpose of getting the excepted trees, mines and minerals.

A venire de novo must therefore be awarded, and the questions for the jury will be, whether, at the time when the road was made, it had become necessary or expedient

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for the dean and chapter, or those claiming under them, to make a road for the purpose of getting the excepted mines; and, if so, whether the road actually made was a proper road for that purpose, assuming that it would be used for no other object.

If either of these questions be answered in the negative, then the plaintiff below will be entitled to compensation in respect of any construction of a permanent nature, which would be an injury to the reversion and which the jury may consider to have resulted from the making of a road at all, or the making of a road unnecessarily large, as the case may be.

*D.*

Venire de novo awarded.

TAYLOR v. CLEMSON and VAUGHAN.

(ERROR FROM THE COURT OF QUEEN'S BENCH.)

*Monday,  
 February 7th.*

In an action for use and occupation, the defendants set up as a defence that

**ASSUMPSIT** for use and occupation. The declaration alleged that the defendants, on the 3d March, 1839, were indebted to him in 26*l.* 5*s.* for the use and occupation of

they had been lawfully evicted by the Manchester and Leeds Railway Company, under the provisions of 6 & 7 *Will.* 4, c. cxi.

By sect. 138 of the act it was enacted, that if any land-owner should not agree with the Company as to the amount of the purchase-money for his land—or should refuse to accept the purchase-money offered, and give notice thereof within one month after the offer—or should refuse to treat after twenty-one days' notice to treat—or should not agree for the sale of his land—or should from absence or disability be incapable of agreeing—or should not disclose his title—or in any other case where an agreement could not be made—then the Company should issue their warrant to the sheriff, commanding him to summon a jury to assess the purchase-money for such land; and the sheriff was to give judgment for such purchase-money, and the verdict and judgment were to be conclusive upon all persons, &c.: Provided that seven days' notice should be given, by the Company to such land-owner, of the time and place of holding the inquisition.

By sect. 140, the verdict of the jury and the sheriff's judgment were to be kept as a record.

By sect. 5, the Company might take land, although omitted from the usual parliamentary schedule of lands required by the Company, if it should appear to two magistrates, in case of a dispute about the same, and be certified under their hands, that such omission proceeded from mistake.

A special verdict found that the premises in question of the plaintiff consisted of a house, and also of a yard and garden occupied therewith, and included in the description of such house, and that two justices certified that the "house" had been omitted from the parliamentary schedule by mistake.

certain messuages, cottages, cellars, a school-house and premises, with the appurtenances.

Pleas: 1. As to 14*l.*, parcel &c., payment of that sum into Court, and a denial of damages *ultrâ* in respect of that sum. Verification, &c.

2. As to the residue, non assumpsit.

Replication: an acceptance of the 14*l.* in satisfaction, and issue joined on the plea of non assumpsit.

The cause was tried before *Maule J.* at the Liverpool summer assizes, 1839, when the jury returned a special verdict, which stated the following facts:

Before the passing of the 6 & 7 *Will.* 4, c. cxi. (local,

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The verdict also stated that the Company had given the plaintiff notice to treat; that he did not disclose his title or agree for the sale; that the Company thereupon issued their warrant for assessing the amount of purchase-money to be paid to him, and gave him due notice of the inquisition; that the inquisition was had, before the sheriff, assessing such amount; that the sheriff had given judgment for the same, and that the Company had paid it into the Bank of England to the plaintiff's credit.

The certificate of justices, the notices, the inquisition, and the warrant which was annexed to the inquisition, were set out.

The warrant contained no recital of any antecedent fact, but proceeded simply "We &c. do by this our warrant, pursuant to the powers given us by the said act &c, command you the sheriff to summon a compensation jury, &c."

The inquisition in like manner contained no recital of any antecedent fact, but merely stated that the compensation jury had been returned in obedience to the warrant, and, after stating the purchase-money awarded, concluded by stating that the sheriff gave judgment for the same, pursuant to the act.

It was objected, to the warrant and inquisition, that they did not upon the face of them state sufficient facts to shew jurisdiction, because they did not state which of the cases under sect. 138 had arisen, as to non-agreement or otherwise, to justify the exercise of the Company's compulsory power to take the plaintiff's land, or state the certificate of justices.

There was also an objection to the inquisition separately, that it did not state the notice of inquisition.

*Held*, 1. That, as the warrant was annexed to the inquisition, they were to be taken as one entire proceeding, and that any deficiency in either instrument might be supplied by reference to the other, and that, as it appeared from the warrant that it had been issued, and from the inquisition that judgment had been given for the purchase-money, pursuant to the act, the proceedings themselves afforded the necessary intendment, that a previous agreement for the purchase-money could not be made.

2. With regard to the omission to state the certificate, that the statement was unnecessary, as the effect of the certificate was simply to place the lands omitted from the parliamentary schedule on the same footing as if they had been inserted therein.

It was also objected to the certificate, that it did not state there had been any "dispute," so as to give jurisdiction to the certifying justices, and that it certified as to the "house" only, without mention of the yard and garden.

*Held*, 1. That the application to the certifying justices of itself shewed there had been a dispute within the meaning of sect. 5.

2. That, as the verdict found the yard and garden had been occupied with the house, as parcel thereof, they were included with the house in the certificate.

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personal and public), intituled "An Act for making a Railway from Manchester to Leeds," the defendants were tenants to the plaintiff of the premises mentioned in the declaration, and more particularly specified in the particulars of demand hereinafter mentioned, for a certain term, at the yearly rent of 26*l.* 5*s.*, payable quarterly &c., and which premises were in the occupation of certain persons hereinafter named, as under-tenants of parts thereof respectively to the defendants.

The particulars of demand annexed to the record claimed four quarters' rent, from the 25th December, 1837, to the 25th December, 1838, "of a house, cottage, two cellars and a school-house, situate in or near to St. George's Street, Oldham Road, in Manchester, in the county of Lancaster."

The particulars were afterwards amended, by inserting the words "yard and garden" after the words "school-house."

On the 18th June, 1838, the Manchester and Leeds Railway Company, who were constituted and incorporated by the statute above mentioned, entered upon and took possession of the premises in the declaration mentioned, claiming title thereto, as hereafter mentioned, and ejected the defendants and their under-tenants.

The verdict stated, "that the said tenancy would have continued, and the plaintiff would have been entitled to such rent to the 25th December, 1838, unless the said tenancy was determined by the said eviction and proceedings of the said Company, and facts and circumstances found in this special verdict. That the sum of 14*l.*, brought into Court by the defendants, under their first plea, is more than sufficient to cover any rent to which the plaintiff was or would be entitled from the defendants, for or in respect of the said premises, or the use or occupation thereof, for any time before the expiration of the quarter ending on the 24th June, 1838. That the defendants did promise in manner and form as in the declaration alleged, as to the residue of the cause of action beyond the 14*l.* in the first

plea of the defendants mentioned, unless the defendants ceased to be tenants as aforesaid to the plaintiff, under and by virtue of the said eviction, and the proceedings of the said Company, and facts and circumstances found in this verdict; but, if under and by virtue of the said eviction &c. the defendants ceased to be tenants of the premises aforesaid to the plaintiff, before the 24th June, 1838, then the defendants did not promise &c., as to the residue &c., beyond the 14/. in the first plea mentioned."

The verdict then made certain formal statements as to the due deposit of maps, plans, and books of reference, containing lists of land-owners &c. with the clerks of the peace, and as to the requisite subscription of capital, and also found "that the messuages, lands, tenements and hereditaments, mentioned in the notices of the said Manchester and Leeds Railway Company, hereinafter next mentioned, and in the warrant and inquisition hereinafter also mentioned and set forth, comprehending, with many other things, the premises in the said declaration and particulars of demand mentioned, were delineated upon the said maps or plans, and described in the said books of reference so deposited with the said clerks of the peace."

The said Manchester and Leeds Railway Company having occasion to take, use and purchase, for the purpose of making the railway works and conveniences, authorised by the said act, the messuages, lands, tenements and hereditaments, mentioned and particularised in the notices of the said Manchester and Leeds Railway Company hereinafter next mentioned, and in the warrant and inquisition hereinafter also mentioned and set forth, including amongst others the premises in the said declaration and particulars of demand mentioned, in all which messuages, lands, tenements and hereditaments, the plaintiff claimed to be interested, on the 28th October, 1837, caused notices to be served, and the same were accordingly served, upon the plaintiff and defendants, and the other persons named in the said notices, and to whom the said notices were addressed;

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the said plaintiff and defendants, and the said several other persons so named in the said notices, and to whom the same were addressed, being the several persons interested, or reputed to be interested, in the messuages, lands, tenements and hereditaments therein mentioned, which notices were to the effect following, &c. and were severally addressed to the said plaintiff and defendants, and other persons therein and hereinafter named, as follows:

“You are hereby required to take notice, that by virtue and under the authority of the following acts of parliament, or one of them, namely, the 6 & 7 *Will.* 4, c. cxi. and 7 *Will.* 4, c. xxiv. all that parcel of land, together with the buildings, if any, thereon, and other the tenements and hereditaments mentioned and described in the schedule hereunder written and delineated, &c. belonging or reputed to belong to you, or some or one of you, or in which you, some or one of you, have or claim some estate or interest, are required by the said Company, and are intended to be taken and used for the purposes of the said acts, or one of them; and you are hereby required to deliver to me, or at the office &c., a statement in writing of the particulars of the estate, share, interest or charge, which you claim to be entitled to, or to be authorised to receive satisfaction and compensation for, of and in the said lands so required to be taken and used.” The notice went on to state (a) that the parties were required to treat with the Company for the sale &c. of their interests, and for compensation for loss or injury &c., “and you are hereby further required to take notice that, if for the space of twenty-one days next after the service of this notice, you shall neglect or refuse, or shall not agree with the said Company for the value, and also for the sale, conveyance and release of your said estate and interest, and for the satisfaction, recompence or compensation to be paid for any damage, loss or injury sustained by you or any of you, by reason of the execution of

(a) See (*post*) sect. 138 of the Company's act, 6 & 7 *Will.* 4, c. cxi.

any of the powers of the said acts, or either of them, authorised, or by reason of the severing and dividing of your or any of your land, and also for or on account of any damage, loss or inconvenience which may be sustained by you or any of you, by reason of the taking of the same land and hereditaments for the purposes of the said act, or by reason of the execution of any of the powers of the same act; or if you or any of you shall, by reason of any impediment or disability, whether provided for by the said first-mentioned act or not, be incapable of making such agreement, conveyance or release, as shall be necessary or expedient for enabling the said Company to take such lands, or to proceed in making the said railway and other works; or shall not disclose and prove the state of the title to the premises, of which you may be in possession, or of the share, interest or charge which you claim to be entitled to or interested in; or in case an agreement for compensation for the purchase of the said lands cannot be made, then the said Company will issue a warrant for the purpose of causing a jury to be summoned, in manner prescribed by the first-mentioned act, for making such inquiry and assessment as is therein specified, and will also take such further proceedings as under any of the circumstances hereinbefore mentioned they are by either of the acts empowered to do."

The above notice was addressed to the plaintiff, the defendants, and several other persons, who were also interested in the premises therein mentioned.

A schedule and plan were annexed to the above notice.

Prior to the issuing the warrant after mentioned, the plaintiff did not disclose the state of his title to the messuages, lands, tenements and hereditaments mentioned and referred to in the said notice, or to any part thereof; nor did he agree with the Railway Company for the sale, conveyance or release of his estate and interest therein, or any part thereof, as required by the said notice.

On the 17th January, 1838, the said Manchester and Warrant.

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Leeds Railway Company issued their warrant under the common seal of the said Company to the sheriff of the county palatine of Lancaster, in which county the messuages, lands, tenements and hereditaments, mentioned in the last mentioned notice and in the said warrant are situate, which warrant was in the words and to the effect following, that is to say, "Lancashire to wit. To the sheriff of the county palatine of Lancaster. We, the Manchester and Leeds Railway Company, incorporated by an act of parliament passed in the 6th and 7th years &c., intituled &c., do by this our warrant, pursuant to the powers for that purpose given to us by the said act, require you the said sheriff to summon, impanel and return a jury of at least eighteen indifferent men, qualified according to the laws of this realm to be returned for trials of issues in her Majesty's Courts of Record at Westminster, to be and appear before you the said sheriff at &c., on the 2nd February next &c., in order that you the said sheriff may out of the persons so summoned, &c., cause to be sworn twelve, who shall be a jury for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid" to the plaintiff, the defendants and the other persons, (then followed the names mentioned in the notice to treat,) for the purchase of &c. (Then followed a description of the messuages and premises to be purchased or compensated for, as in the schedule and plan annexed to the notice to treat. There was also a plan in the margin of the warrant, including, (among other things), the premises in the declaration and particulars of demand mentioned.

The warrant was under the seal of the Company.

On the 20th January, 1838, being more than seven days before the holding of the inquisition hereafter mentioned, the Company caused notices of the time and place, at which such jury were required to be returned, to be served upon the plaintiff and defendants and the other persons mentioned in the above mentioned notice to treat and warrant. The notices commenced thus, "In pursuance of an

act, (setting out the title of 6 & 7 Will. 4, c. cxi.), notice is hereby given you, that a jury to be summoned, impanelled and returned, according to the provisions of the said act, will come and appear before the sheriff of the county palatine of Lancaster at &c., on the 2nd February, 1838, at &c., (the hour), for the purpose of inquiring of, assessing and giving a verdict for the sum of money to be paid for the purchase of " &c., (setting out the premises as in the notice to treat and warrant), "when and where you may attend if you please, and when and where you are hereby required to produce all your and each of your grants, leases, or agreements for leases, valuations, rentals, receipts for rent, and other evidences, papers and writings whatsoever, touching or relating to the hereditaments, premises, and matters aforesaid or any of them."

Signed by the clerk of the Company.

Annexed to the notice was a plan corresponding with the plan in the margin of the above warrant.

On the 30th January, Mr. *Taylor* served the clerk of the Company with a protest, denying the right of the Company to take certain parts of the premises mentioned in the notices and warrant, and denying the right of the sheriff to assess the value of such premises, on the ground that they were not sufficiently described in the said books of reference, so deposited with the clerks of the peace as aforesaid, or in the schedule annexed to the first mentioned act, and that the omission in such schedule, so far as related to the premises in the declaration and particulars of demand mentioned, was not sufficiently corrected by the justices' certificate hereafter mentioned.

At the appointed place and hour on the 2nd February, the jury, who had been summoned by the sheriff for that purpose, attended to assess the value of the premises mentioned in the notices and warrant. The plaintiff, under protest, attended by counsel, but made no other objections to the Company's proceedings. No evidence was then given of the title of the plaintiff or of the other parties to

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the premises required by the Company. The plaintiff examined witnesses as to the value of the premises, and did not require his interest to be assessed separately from that of the other parties named in the notices, nor were the interests of those parties required to be assessed separately, and thereupon and then and there an inquisition, verdict and judgment was had, taken and given, which inquisition, verdict and judgment was drawn up in writing and signed by the said sheriff, and sealed with the seal of office of the said sheriff, and was also signed by and sealed with the seals of the jurors of the said jury and each of them, and was forthwith duly deposited with and kept by the clerk of the peace of the said county of Lancaster among the records of the quarter sessions of the said county of Lancaster, which inquisition, verdict and judgment, so drawn up in writing, signed, sealed, deposited and kept as aforesaid, was and is to the effect and contained the words following, (amongst others,) that is to say,

Inquisition.

“ Lancashire, to wit. An inquisition, verdict and judgment, had, taken and given at &c. before me &c. sheriff &c. pursuant to an act of parliament, (reciting the title 6 & 7 Will. 4, c. cxi.) on the oaths of &c. here duly impanelled, summoned and returned by the said sheriff &c. in pursuance of and in obedience to a warrant made and issued under the common seal of the Manchester and Leeds Railway Company to me directed and delivered, and *hereunto annexed*, who being sworn and charged as in and by the said warrant directed, upon their oaths present and say that they have inquired of, found and assessed, and do find, assess and give this their verdict for the sum of 17,000*l.*, to be paid by the said Manchester and Leeds Railway Company for the purchase of &c. (describing the premises as in the notices and warrant, and including (among other things) all the premises in the declaration and particulars of demand mentioned.) And the jurors aforesaid are not required to settle what shares and proportions of the purchase money and compensation money aforesaid, by them

assessed as aforesaid, should be allowed to any person or persons having a particular estate, term or interest therein. Whereupon I, the said sheriff, in pursuance of the said act of parliament, do pronounce and give judgment for such purchase money, so assessed as aforesaid by the said jurors, according to the direction of the said act.

In witness whereof I, the said sheriff, have hereunto set my hand and the seal of my office, and the jurors aforesaid have hereunto set their hands and seals the day and year first above written."

On the 12th April, the Company, by their clerk, sent a requisition to the plaintiff, calling upon him to shew his title to the said premises.

The plaintiff refused to shew his title, and never made any conveyance of the premises to the Company. He refused also to accept the purchase money awarded.

On the 30th April, a check or order was drawn by two of the Company's directors on their bankers, and was lodged with them, requiring them to pay to the plaintiff or bearer 17,000*l.*, which sum was directed, by a memorandum written upon the face of the check, to be paid into the Bank of England under the direction of the agents of the Company's solicitor. After the check was drawn, the agents of the Company's solicitor procured from the accountant-general of the Court of Exchequer his direction to the Bank of England to receive the 17,000*l.*, which was thereupon paid by the Company's bankers from the funds of the Company, under the direction of the said agents, and by the orders of the directors of the Company, on the 7th June, into the Bank of England, in the name and with the privity of the accountant-general of the Court of Exchequer, to be placed, and the same was placed, to his account, to the credit of the plaintiff, the defendants, and the other persons above referred to, and all other persons interested in the premises mentioned in the inquisition.

On the 18th June the Company entered upon and took possession of the premises mentioned in the declaration

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and particulars of demand, together with the other premises in the warrant, inquisition, verdict, and judgment mentioned, and evicted the defendants and their under-tenants from the premises in the declaration and particulars of demand mentioned, the Company claiming title to all the said premises by virtue of the said act of parliament, warrant, inquisition, verdict, and judgment, payment of money into court, and other acts and proceedings aforesaid.

The verdict found "that all the said lands, messuages and other hereditaments in the said notices and warrant of the said Manchester and Leeds Railway Company, and in the said inquisition mentioned and described, and the value whereof was so assessed as aforesaid, were properly and sufficiently delineated on the plans and described in the books of reference deposited with the said clerks of the peace as aforesaid.

"That all such of the said messuages, lands, tenements, and other hereditaments, in the said notices and warrant of the said Manchester and Leeds Railway Company mentioned and described, as were required by the said first-mentioned act of parliament to be specified in the schedule thereunto annexed, were properly and sufficiently specified in such schedule, with the exception of the premises mentioned in the said declaration and particulars of demand, and with reference to the said premises mentioned in the said declaration, and specified in the said particulars of demand, the jurors, &c. find that the same were wholly omitted in the schedule to the said first-mentioned act of parliament.

Description of  
 plaintiff's pre-  
 mises.

"And the jurors aforesaid, upon their oath aforesaid, further find the following facts with respect to the said premises mentioned in the said declaration and specified in the said particulars of demand, and the situation, description and occupation thereof, that is to say, &c. find that the premises mentioned in the said declaration and specified in the said particulars are situate on the north-east side of a street called St. George's Street, in Manchester,

which leads at right angles from the Oldham Road in a north-westerly direction to St. George's Church.

"That the school-house mentioned in the plaintiff's said particulars is a building nearly square, fronting to St. George's Street; and the said school-house was at the time of passing the act of parliament, and at the time of holding the said inquisition aforesaid, in the possession of the Rev. *James White* as under-tenant to the defendants.

"That the cellars mentioned in the plaintiff's particulars were under the said school-house, and were part and parcel of the same building; and at the time of passing the said act of parliament the same were in the occupation of *Rich. Fitzgerald* and *Mary Thomson* as under-tenants.

"That the house mentioned in the plaintiff's particulars adjoins on the south-east side of the school-house, and fronts principally towards the south-east; but the offices are built at right angles to that front, so as to face St. George's Street, and the line of the office is continued by a wall which fences off a yard behind the same.

"That along the north-east side of St. George's Street is built a wall parallel to the said offices, and continuing wall before mentioned, and fencing off the said house from the street, and the area included, between the said south-east front of the said house, the said front of the said offices and continuing wall, and the said other wall built parallel thereto, being in length twenty yards and in width seven yards, had been used as a garden; and behind the said offices and adjoining thereto is a yard, containing sixty square yards, of which the south-east wall of the said offices, and the continuing wall before mentioned, constitute two sides, and in which yard are the privy and conveniences belonging to the said house.

"That the only entrance to the house from the street is through a gate, and across the said space of ground to the door in the said wall adjoining St. George's Street, on the south-east front of the said house; and the only entrance to the yard from the street is through the same gate and

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across the said space, and through a yard door placed in the said continuing wall, which fences off the said yard.

“That the said garden and yard are the garden and yard mentioned in the said amended particulars.

“That the said house, with the said yard and garden, were, at the time of the passing of the said first-mentioned act of parliament and of the holding the inquisition aforesaid, in the occupation of *John Macfarlane*, under the said defendants.


“That the cottage mentioned in the plaintiff’s particulars was situated on the north-west side of the said school, and was separated from it by a passage leading from St. George’s Street, and running along the north-west side of the said school; and that the entrance to the said cottage was from the said passage; and that at the time of passing the act of parliament, and of holding the inquisition aforesaid, the said cottage was occupied by *John Swan*, under the defendants.”

On the 12th and 13th October, 1837, the clerk to the Company served written notices upon the plaintiff, the defendants, and the other persons interested in the premises in the said declaration and particulars mentioned, that on the 28th instant application would be made to the magistrates in Salford for a certificate that the said last-mentioned premises were omitted by mistake in the schedule of the 6 & 7 Will. 4, c. cxi.

Certificate of  
justices.

On the 28th October, 1837, application was accordingly made to the said magistrates for such certificate, when the plaintiff attended by his counsel and attorney, and the magistrates made and issued a certificate under their hands in the following words:—“We, S. P. and J. B. &c. two &c., acting &c., having carefully inquired into the circumstances, and had good and satisfactory proofs adduced before us of the facts, do hereby, in pursuance and exercise of the power and authority given and granted to us by the 6 & 7 Will. 4, c. cxi., certify that the several tenements, hereditaments and buildings, hereinafter mentioned and

specified in the schedule hereunder written, were by mistake omitted to be inserted in the schedule to the said act of parliament. And we do further certify, that the said several omissions referred to in this our certificate, or in the schedule hereunder written, have proceeded from mistake, and that the said several tenements, buildings, hereditaments and premises, in this our certificate mentioned and referred to, appear to us to be required for the purposes of the said railway, by the said act authorised to be made, and to be within and subject to the powers and authorities in and by the said act given to the company of proprietors thereby incorporated. As witness," &c.

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*The Schedule above referred to.*


| No. on the Plan. | Owners or Reputed Owners.                                                             | Lessees.                                             | Occupiers.                                                                      | Description of Property.                |
|------------------|---------------------------------------------------------------------------------------|------------------------------------------------------|---------------------------------------------------------------------------------|-----------------------------------------|
| 25               | H. Taylor, Esq. (the plaintiff), an interest therein being claimed by E. T. and J. T. | William Clemson and Joseph Vaughan } the defendants. | John Macfarlane, John Swan, Richard Fitzgerald, Mary Thomson, Rev. James White. | House, Cottage, Two Cellars and School. |

The certificate was deposited with the clerk of the peace on the 1st November, 1837.

On appeal by the plaintiff against the certificate to the Lancashire quarter sessions, on the 16th January, 1838, the certificate was confirmed.

"And the jurors &c. further find, that the said house, cottage, cellars and school-house, specified in the said particulars of demand and mentioned in the said declaration, were sufficiently specified in the said certificate of the said justices of the peace and schedule thereunto annexed.

"That at the time of the passing of the said act, and on the 30th November, 1835, and from thence hitherto, the said yard and garden specified in the said amended particulars of demand, and being part of the premises in the declaration mentioned, were and have been and still are

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respectively parcel of and included in the description of the said house specified in the said schedule to the said certificate, and occupied therewith as such parcel thereof, but whether the same should or should not, according to the true meaning of the said act of parliament, have been specified in the schedule thereto, or in the said certificate of the said justices of the peace and schedule thereto, separately and distinctly from the said house so specified as aforesaid, of which the jury find the same yard and garden to have been and to be such parcel as aforesaid, and so included in such description as aforesaid, and occupied therewith as aforesaid, the jurors aforesaid are wholly ignorant and pray the advice" &c.

Deviation.

The verdict then found that the Company had executed a portion of the railway so as to cross lands mentioned in the 59th section of the 6 & 7 Will. 4, c. cxi. therein called the lands of the Bishop of Bristol and *Joseph Livesay*; that the railway passes obliquely between streets there called Allen Street and Charles Street, so as to leave a space of twenty-four yards between the railway and Charles Street, but not that space between the railway and Allen Street, a part of which is passed over by the railway. But the verdict also found that the Company had, before making the railway, purchased the whole of the last-mentioned street and the intervening space, and that the fee simple thereof had vested in the Company, and that this portion of the railway was made in the line delineated in the deposited plans without any deviation therefrom.

On this special verdict judgment in the Court of Queen's Bench was entered up for the defendants in error, by consent, without argument.

The case was argued in Michaelmas vacation last (Dec. 8th and 16th), before *Tindal C.J.*, *Coltman* and *Maule Js.*, Lord *Abinger C. B.*, *Parke*, *Alderson* and *Rolfe Bs.*

*Kelly* for the plaintiff in error. The question is, whether the eviction, by the Manchester and Leeds Railway

Company, of the defendants, from the premises which they held as tenants to the plaintiff, was lawful. If it was not lawful, the tenancy of the defendants to the plaintiff was not determined. It is contended for the plaintiff in error that such eviction was wrongful, and that therefore it is no answer to this action for use and occupation.

The title of the Company to evict depends upon the question whether, on the facts and proceedings, as set out on the special verdict, the Company had acquired a title at the time of the eviction.

It is submitted that the Company's warrant to the sheriff to impanel a compensation jury, and the inquisition and the certificate of justices, are all void, because the jurisdiction of the respective parties making those instruments does not appear upon the instruments themselves.

1. As to the warrant and inquisition. The cases in which the Company may issue their warrant to the sheriff to summon a compensation jury, and the jury may assess compensation, are provided for by the 138th section (a). The cases

(a) Sect. 138. "And for settling all differences which may arise between the said Company and the several owners and occupiers of or persons interested in any lands, which shall or may be taken, used, damaged, or injuriously affected, by the execution of any of the powers hereby granted, be it further enacted, that if any person, corporation or trustee, so interested or entitled, and capacitated to sell, agree, convey, or release as aforesaid, or any other person, shall not agree with the said Company as to the amount of such purchase money, or satisfaction, recompence or other compensation as aforesaid, or if any of the parties entitled to receive such purchase money, satisfaction, recompence or other compensation as aforesaid, shall

refuse to accept such purchase money, satisfaction, recompence or other compensation as aforesaid, as shall be offered by the said Company, and shall give notice thereof in writing to the said Company within one calendar month next after such offer shall have been made, and the party giving such notice shall therein request that the matter in dispute may be submitted to the determination of a jury, or if any of such parties as aforesaid shall, for the space of twenty-one days next after such notice in writing shall have been given to the clerk, agent or principal officer of any such corporation, or to any of such trustees or persons respectively, or left at his last or usual place of abode, or with the tenant or occupier of any

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are seven:—1, If the landowner shall not agree with the Company as to the amount of purchase money; 2, or if he shall refuse to accept the purchase money offered by the Company, and shall give notice to the Company of his

lands required for the purposes of this act, neglect or refuse to treat, or shall not agree with the said Company for the sale, conveyance, and the release of their respective estates or interests, or the respective estates or interests which they respectively are hereby capacitated to convey therein or dispose of, or for the satisfaction, recompence or compensation to be paid to them for any damage, loss or injury whatsoever as aforesaid, or shall by reason of absence be prevented from treating, or shall by reason of any impediment or disability, whether provided for by this act or not, be incapable of making such agreement, conveyance or release as shall be necessary or expedient for enabling the said Company to take such lands, or to proceed in making the said railway and the other the works aforesaid, or shall not disclose and prove the state of the title to the premises of which they respectively may be in possession, or of the share, interest or charge which they may claim to be entitled unto or interested in, in case they shall be required so to do by the said Company, or in any other case where agreement for compensation for damages incurred in the execution of this act, or for the purchase of lands required for the purposes of this act, cannot be made, then and in every such case the said Company shall, and they are hereby required from time to time, to issue a warrant,

either under their common seal or under the hands and seals of three at least of the directors of the said Company, to the sheriff of the county in which the lands in question shall be situate, or the matter in dispute shall arise, &c. commanding such sheriff, &c. to impanel, summon and return, and the said sheriff, &c. is hereby accordingly empowered and required to impanel, summon and return a jury, &c. and such jury shall, upon their oaths, &c. inquire of and assess, and give a verdict for the sum of money to be paid for the purchase of such lands, (except for such interest therein as shall have been of right purchased by the said Company from any other person,) and also the sum of money to be paid by way of satisfaction, recompence or compensation, either for the damages which shall before that time have been done or sustained or on any other account, or for the future temporary or perpetual, or for any recurring damages, to be so done or sustained as aforesaid, and the cause or occasion of which shall have been in part only obviated, removed or repaired by the said Company, and which cannot or will not be further obviated, removed or repaired by them, and for any other damage, loss or injury as aforesaid; which satisfaction, recompence or compensation for such damage or loss shall be inquired into and assessed separately and distinctly from the

refusal one month after their offer; 3, or, if after twenty-one days' notice from the Company, he shall refuse to treat with the Company; 4, or, after the like notice, shall not agree; 5, or, if from absence or disability he shall be incapable of agreeing for the purchase; 6, or, if he shall not disclose and prove his title, if required by the Company to do so; 7, or in any other case where agreement for purchase cannot be made. The same section also contains a proviso that "seven days' notice in writing of the time and place at which such jury are so required to be returned, shall be given by the said Company or the party with whom any such controversy shall arise." The objection founded on this proviso is confined to the inquisition; but the other objections apply to the warrant as well as to the inquisition. This is important, as the defendants will attempt to sustain the inquisition by incorporating the warrant with it.

There is a long course of decisions from the time of Lord *Mansfield* C. J. down to the present time, which all tend to establish the proposition that no documentary proceeding, which emanates from an inferior jurisdiction, whether the proceeding be an inquisition of a compensation jury or an order of justices, can be effectual to bind the rights of parties, unless every thing essential to give jurisdiction appear upon the face of such proceeding. In *Doe d. Payne v. The*

value of the lands so to be taken or used as aforesaid; and the said sheriff, &c. shall accordingly give judgment for such purchase money, satisfaction, recompence or compensation as shall be assessed by such jury; which said verdict, and the judgment thereon to be pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, upon all persons and corporations whatsoever: Provided also, that not less than seven days' notice in writing of the time and place at which such jury are so required to be returned,

shall be given by the said Company to the party with whom any such controversy shall arise," &c.

Sect. 140 enacts, "That the said verdicts and judgments, being first signed by the said sheriff, &c. presiding at the taking of such verdict and pronouncing such judgment, shall be kept by the clerk of the peace for the county or riding in which the matter in dispute shall have arisen, among the records of the quarter sessions of such county or riding, and shall be deemed records to all intents and purposes."

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*Bristol and Exeter Railway Company* (a), the right of the plaintiff to recover was admitted to depend on the question, whether the Company, in taking possession of the plaintiff's land, had complied with their act of parliament. The 25th section of that act was very similar to the 198th section of the present act, with respect to the cases in which that Company might direct their warrant to the sheriff to assess the purchase money of lands required by the Company. It was objected for the plaintiff there, "that the inquisition was void for not setting out all the preliminary proceedings necessary by the act of parliament to enable the Company to put in force the powers thereby given for the compulsory taking of lands, and particularly that the whole capital had been previously subscribed as required by section 242." It was said in argument, "the sheriff is not to adjudicate upon the rights of the parties; it is a mere inquest of office." On this *Parke B.* observed, "the question is, whether it is not enough to state in the inquisition *all that is required by the section relating to the inquisition*; and whether, if there have been a non-compliance with the act by the non-payment of the capital, that should not have come by way of answer from the plaintiff." There it will appear that the objection was not that the inquisition did not state all the facts made necessary to its validity by the section which authorised the inquisition to be taken, but that a preliminary and unconnected fact, the subscription of capital, provided for by another distinct and later section, was not stated. *Parke B.* also observed during the argument, "I see the sheriff is to give a *judgment*; therefore every thing necessary to give him jurisdiction should appear on the inquisition and judgment, or some part of it." That observation was made when *Reg. v. Trustees of Swansea Harbour* (b), which may be relied upon for the defendants in this case, was cited. *Parke B.* says subsequently, in giving his judgment, "It must be admitted, according to the authorities on this sub-

(a) 6 M. &amp; W. 320.

(b) 8 A. &amp; E. 439; S.C. 1 P. &amp; D. 512.

ject, that inasmuch as there is to be an extraordinary jurisdiction exercised by the sheriff, in giving judgment as to the amount of compensation, every thing that was made preliminary by the act of parliament ought to be set out on the inquisition. The question is, whether all that the act makes necessary is set out on the face of the inquisition, at the foot of which is the sheriff's judgment. It seems to me that it is. All that the act requires in the first instance is to be found in the 25th section; and it appears to me that every thing which *that* section makes necessary has been duly set out on the face of the inquisition." So that in that case the inquisition was held good because it *did* set out the notice of inquisition, and all the other antecedent matters, which, by the section authorising the inquisition, were necessary to its validity, and it clearly would have been held bad had it not done so. Here no one of the antecedent facts required by the 138th section is set out; the warrant is the only one of the necessary facts which is even referred to, and the warrant is itself open to all the same objections, that it does not state the existence of any one of the seven cases in which it could be issued. Even if it be true that the sheriff was not to judge whether any of the facts existed which were to give him jurisdiction, still the existence of those facts should have been alleged on the face of the inquisition, and they do not appear there, or even on the warrant, which is the act of the Company itself. [Lord Abinger C. B. mentioned a compensation case, which was tried before Thomson B., where the Company, against whom the compensation was to be assessed, claimed the right to begin, on the ground that they had to prove the antecedent matters on which the jurisdiction of the judge, before whom the inquiry in that case might be had instead of the sheriff, if the parties wished it, was made to depend, and the learned judge decided that he had no jurisdiction to inquire into such matters, and the ruling was afterwards confirmed by the Court of King's Bench. A subsequent case before *Le Blanc J.* was determined by him in the same way,

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and the Court of King's Bench supported his decision. It may, however, although the assessor has no jurisdiction to *inquire* into such preliminary matters, be necessary to *state* them *pro forma*.] Such matters must exist, and it is by reason of their existence, and nothing else, that the sheriff had authority to take the inquisition. It was said in *Reg. v. The Manchester and Leeds Railway Company* (a) that the only matters to be stated were such as the Court or other authority had necessarily cognisance of, but even that argument would be fatal to this warrant, for it is the language of the Company, who had necessarily the knowledge of all the antecedent matters. On the validity of that argument it was not there necessary for the Court to decide, but Lord Denman C. J. expressed his dissent from it. With regard to the objection also, that the inquisition does not state that seven days' notice of it had been given, although the sheriff and jury had no previous cognisance of the subject, *he* was surely bound to inquire whether notice had been given. In *Rex v. Croke* (b), it appeared that the mayor, aldermen and commons of the city of London, in common council assembled, had authority by statute to purchase any lands which *they* should think necessary for the purposes of the act, and, in case of the landowner's refusal or inability to treat, then the justices of Surrey, at their quarter sessions, were required, upon application of the mayor &c., to issue a precept to the sheriff to summon a compensation jury, "*notice in writing* having previously been given to the persons interested, at least fourteen days before." The sessions, before whom the jury was summoned, gave their judgment for compensation, which recited that "the precept had issued on the application of the mayor, commonalty and *citizens*" of London, and that "due notice" of the inquiry had been given to the party interested. Lord Mansfield C. J. observed, in giving his judgment, "This is a special authority, delegated by act of parliament to parti-

(a) 8 A. & E. 413; S. C. 1 P. & D. 164.

(b) Cowp. 26.

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cular persons, to take away a man's property and estate against his will, therefore it must be *strictly* pursued, and must appear to be so upon the *face* of the order. Several objections have been taken to this order in point of form, which are material. 1st. That the mayor, aldermen and commons, in common council assembled, have not given an opinion that the lands are necessary to be purchased, nor that an application was made by them to the justices, but that an application was made by the mayor, commonalty and citizens." "It ought to have been stated that the mayor, aldermen and commons, in common council assembled, had given such an opinion, and that an application had been made by them to the justices. There is another objection in point of form, which is not mentioned at the bar; which is, that the order does not state that a *notice* was given in *writing* to Mr. C. according to the requisites specified in the act, but only says 'upon proof of *due* notice having been given to him,' which is insufficient, a particular notice being specified by the act." Aston J. also says, "the notice required by the act ought to have been fully set out and precisely pursued, and it is not cured by his appearance." The order was quashed.

In that case the argument would have applied as much as in this case, that the sessions had no jurisdiction to inquire whether the requisites of that statute had been previously complied with. The case is also an authority to shew, that the plaintiff's appearance under protest will not cure the defect of jurisdiction apparent upon the face of these proceedings. In *Rex v. Mayor &c. of Liverpool (a)*, the objection was made to an inquisition taken before the sheriff of Lancashire, that no proper notice had been given. To this it was answered, that "the sheriff had nothing to do with the notice, which is an anterior act, to be done twenty days before the inquisition." But Lord Mansfield C. J. "thought that notice ought to have been given to the parties interested in the lands, and that it ought to have appeared

(a) 4 Bur. 2244.

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upon the inquisition, and also to shew that there was jurisdiction." And for want of notice appearing thereon, the inquisition was quashed. *Rex v. Manning* (a), was an order under 29 Geo. 2, c. 67, which provided that the surveyor of the highways might, if no proper materials for repairing the roads could be found in wastes near the highway, dig for such materials on the lands of an individual, on giving six days' notice. The order did not expressly shew that there were no materials in any waste, nor that notice had been given, and it was quashed, Lord Mansfield C. J. saying, "it is necessary to shew that there were no proper materials to be found in or upon the wastes" &c., and Denison J. "An express and direct adjudication may not be necessary, but many of these foundations or their authority ought some how or other to appear upon the face of the order. Particularly it ought to appear that notice was given of their intention to dig in some particular place." Under a turnpike act the trustees had power to turn roads through private grounds, making satisfaction to the owners, and, in case of disagreement as to such satisfaction, were enabled, on giving notice to the owners, to summon a compensation jury; and in *Rex v. Bagshaw* (b), the Court quashed an inquisition under that act, because it did not on the face of the inquisition appear that notice had been given. "The Court said that notice to the parties interested was the foundation of the whole proceedings below, and that therefore it should have been stated; for, if no notice were given, the trustees had no jurisdiction. And with respect to counsel having been heard before the jury, they said it did not appear that any counsel for the defendants had been heard." The affidavits in that case have been referred to, and it appears that the defendant did attend by his attorney, so that it is clear the Court looked only at what was on the face of the inquisition. The case therefore is a distinct authority, that the want of averment of notice is not cured

(a) 1 Burr. 377.

(b) 7 T. R. 363.

by the fact of notice. In *Rex v. All Saints, Southampton*(a), the examination of a soldier before two justices was offered in evidence, although it did not upon the face of it appear that he was quartered at Southampton, where they had jurisdiction. The examination was held not admissible, *Bayley J.* saying, "it should have appeared on the face of the examination that he was quartered at Southampton," and *Holroyd J.* "the rule, that in inferior courts and proceedings by magistrates, the maxim 'omnia præsumuntur rite esse acta' does not apply to give jurisdiction, has never been questioned. Here then the jurisdiction should, at all events, have appeared on the face of the examination, supposing proof of it aliunde not to have been necessary." *Day v. King*(b), *Brook v. Jenney*(c), *Christie v. Unwin*(d), in the latter of which cases an order of the Lord Chancellor was held bad for not stating the facts which gave jurisdiction, are authorities to the same point, that, if jurisdiction does not appear upon the face of an order or other proceeding of a limited jurisdiction, the apparent defect is not cured by the appearance or acquiescence of the party against whom it is sought to enforce such proceeding, or by proof that the facts themselves, on which the jurisdiction is founded, really exist.

*Reg. v. The Committee-Men of South Holland Drainage*(e) may be cited for the defendants. But that was an application for a certiorari, and the Court, exercising its discretionary power with respect to that mode of proceeding, refused the certiorari, because the party who impugned the inquisition, on the ground that it did not set out the notice to treat, had himself expressly waived such notice. Lord Denman C. J. declared his opinion, that, had it not been for the conduct of the applicant himself, the want of averment of notice would have been fatal to the inquisition, and *Patteson*

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(a) 7 B. & C. 785; S. C. 1 M. & R. 663.

(b) 5 A. & E. 359; S. C. 6 N. & M. 845.

(c) 1 G. & D. 567.

(d) 11 A. & E. 373; S. C. 3 P. & D. 204.

(e) 8 A. & E. 429; 1 P. & D. 79.

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J. added, "this case must not be cited to shew, that notice, and all things necessary to give authority, need not be stated on the face of the inquisition." In *Reg. v. The Trustees of Swansea Harbour* (a), the same objection to an inquisition was overruled, but that was on the ground that the trustees made the objection for the purpose of setting aside their own inquisition.

Another fatal objection to the inquisition is, that it omits to state the certificate of justices, without which the lands in question, having been omitted in the schedule to the act, could not be taken. This last and the former objection, that the inquisition omits to state which of the cases, enumerated in the 138th section, has occurred, so as to entitle the Company to use their compulsory powers of taking land, apply to the warrant as well as to the inquisition. The objection, that the warrant and notice of inquisition are not set out, applies, of course, to the inquisition only.

2. The certificate of justices, which is a necessary part of the Company's title, is void. The objections to the certificate are founded upon the 5th (b) and 7th sections, and

(a) 8 A. & E. 439; S. C. 1 P. & D. 512.

(b) The 5th sect. is, "Provided always, and be it further enacted, that it shall be lawful for the said Company to make the said railway and other works upon, in, over or through the lands delineated on the said maps or plans, although such lands, or any of them, or the situation thereof respectively, or the name of the owners or of the occupiers thereof respectively, may happen to be omitted, misstated, or erroneously described in this act, or in the schedule thereto, or in the said books of reference, if it shall appear to any two or more justices of the peace for the said county palatine of Lancaster, or for the West Riding of the county of York, or for the borough of

Leeds (in case of a dispute about the same), and be certified by writing under their hands, that such omission, misstatement or erroneous description, proceeded from mistake; and the certificate of the said justices shall be deposited with and remain in the custody of the clerk of the peace for the said county palatine of Lancaster, or for the said West Riding, or for the said borough of Leeds, as the case may require."

The 7th section is, "Provided also, and be it further enacted, that nothing herein contained shall authorise the said Company, or any person acting under their authority, to take, injure or damage, for the purposes of this act, any house or other building, which was erected or

are, 1. That it is only in case of a dispute about the same, that the justices have jurisdiction to grant a certificate that the premises are omitted in the schedule, and that this certificate does not allege such dispute. 2. The "yard and garden," part of the premises in question, are omitted from the schedule to the certificate, and it appears, from the schedule to the act, that, whenever it was the intention that a yard or garden should be included in the description of any premises, such yard and garden are expressly named.

3. Another objection to the title of the Company is, that they have deviated into Allen Street, in contravention of the 59th section, and though this is not a deviation directly respective of the plaintiff's property, yet the Company have thereby forfeited their compulsory powers of taking the plaintiff's lands, among others, for the purpose of continuing the railway in a prohibited direction.


4. The check drawn by two directors was not a payment of the purchase money by the Company. [Lord Abinger C. B. It is a payment by the Company through the two directors, who drew the check.]

*Cresswell* contrà. This record shews that the Railway Company have done all that the statute requires to complete their title to the premises in question; the eviction therefore of the defendants was rightful, and discharges them from the present claim for use and occupation.

1. It is said that the inquisition is void, because it does not state any notice to treat, or disagreement, or other case,

built on or before the 30th day of November, 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue to a house, or any inclosed ground planted as an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than and except such as are specified in the sche-

dule to this act annexed, without the consent in writing of the owner and occupier thereof respectively, unless the omission thereof in such schedule shall have proceeded from mistake, and unless it shall be so certified in manner herein-before provided for in cases of unintentional errors in the said book of reference."

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within the 138th section, to authorise the taking of the inquisition; and it is further objected, that it ought to have stated the certificate and the notice of inquisition. The answer is, that the inquisition refers to the warrant, which is incorporated with it, and that the very circumstance of the Company issuing their warrant, to assess the amount of purchase-money, shews that they do not agree with the land-owner. [*Alderson B.* The first case in the section seems to be where the landowner does not agree to the price, and the second, where he does not agree to treat at all.] The section allows the Company to issue their warrant in *any* case where the Company and land-owner do not agree. Now as there must be the concurrence of both parties to constitute an agreement, and as the Company may themselves choose to disagree, the issuing their warrant is ipso facto proof of disagreement. The Company are certainly not bound to make an offer of any sum to the land-owner in the first instance, for the 143d section provides that, if they do not make any offer, they shall pay the costs of taking the inquisition.

The warrant, which is directed to the sheriff, was the only thing necessary to put him in motion and to give him jurisdiction, and it was not necessary that the inquisition should state any other fact of which he would have no cognisance. The true principle on which magistrates and inferior courts are required to state on their proceedings such matter as is essential to give jurisdiction, is adverted to by *Patte-son J.* in *Rex v. The Trustees of the Norwich and Watton Road* (a)—“Whether the notice ought to appear on the inquisition is a point on which I desire not to be concluded; but my impression is that it should appear, not as the finding of the jury, but in the nature of a *caption*.” Now what is a caption? It is the history given by a court of *its own* proceedings; 1 *Starkie*, Crim. Pl. 233; and, where such court is a court of record, that history is conclusive: *Holroyd J.* in *Basten v. Carew* (b). But the reason why that history or record

(a) 5 A. & E. 563; S.C. 1 N.  
 & P. 32.

(b) 3 B. & C. 649; S. C. 5 D.  
 & R. 558.

is conclusive, is because the matter so recorded is matter which the Court was bound to investigate and adjudicate upon. It is with respect to such matters only, on which the record is conclusive, that it will be bad if it do not state them. In *Kite and Lane's* case (*a*), a conviction for smuggling was held bad, because it did not state that the convicting justices resided near to the port into which the vessel was carried. That fact was certainly necessary to give them jurisdiction, but it was also a fact which they had to ascertain.

In *Rex v. Croke* (*b*), which has been cited for the plaintiff, it is clear that the sessions, whose judgment was quashed for not averring notice, had themselves to give the notice. So in *Rex v. The Mayor &c. of Liverpool* (*c*) "*The sheriff*," says Willes J., "was to give the notice, and he should have shewn it." In *Rex v. Bugshaw* (*d*) and *Rex v. The Trustees of the Norwich and Watton Road* (*e*) also the turnpike trustees, before whom the inquisition was taken, had themselves to give the notice. In the present case, suppose the sheriff had doubted whether the plaintiff and the Company did not in fact really agree, he could not have inquired into the matter, their warrant alone was sufficient to give him jurisdiction. Where a venire goes to the sheriff from an inferior Court, is he to inquire whether the cause of action arose within its jurisdiction? In *Day v. King* (*f*), an order of justices upon the stewards of a friendly society, requiring them to pay money to a member of the society, under 49 Geo. 3, c. 125, was held bad for omitting to state that the applicant was a member, and that the parties applied against were stewards of the society. But both these were facts upon which the justices had to adjudicate, and consequently, if the order had stated those facts, it would have been conclusive. The same remark applies to *Christie v.*

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(a) 1 B. & C. 101; S. C. 2 D.  
& R. 212.

(b) 1 Cowp. 26.

(c) 4 Bur. 2244.

(d) 7 T. R. 362.

(e) 5 A. & E. 563; S. C. 1 N.  
& P. 32.

(f) 5 A. & E. 359; S. C. 6 N.  
& M. 845.



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*Unwin* (a), where the Lord Chancellor, sitting in bankruptcy, and in exercise, not of his ordinary jurisdiction as chancellor, but of a statutory jurisdiction, under 6 Geo. 4, c. 16, s. 18, did not state in his order that the creditor applying to have his debt substituted for that of the petitioning creditor had proved a sufficient debt before the application.

If this inquisition is had on the face of it, how could the Court of Queen's Bench have refused to quash it in *Reg. v. Manchester and Leeds Railway Company*? (b) It must have been on the ground that it was not void, and *Reg. v. The Committee-Men for the South Holland Drainage* (c) must have been decided on the same ground. *Reg. v. The Trustees of Swansea Harbour* (d) is a still stronger case, for there the Court of Queen's Bench lent its authority to enforce by mandamus that which, according to the argument for the plaintiff in this case, was a void inquisition. The plaintiff must contend that there was error on the record in that case, and that the Court of Queen's Bench advisedly gave judgment, which might have been reversed on error, because it was dissatisfied with the conduct of the party who impugned the inquisition.

In *Rex v. All Saints, Southampton* (e), the examination taken by the magistrates was no record at all, for they were acting ministerially only, as officers under the statute, to take evidence. If, therefore, the examination had stated that the soldier was quartered in the place where they had jurisdiction, it would not have been conclusive of that fact, but, if the examination had been a record, the test adverted to would have applied—the examination would have been conclusive, because the justices were bound to ascertain the fact.

2. At all events the inquisition is not void, and therefore,

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|-----------------------------------------|-------------------------------|
| (a) 11 A. & E. 373; S. C. 3 P. & D. 79. |                               |
| & D. 204.                               | (d) 8 A. & E. 439; S. C. 1 P. |
| (b) 8 A. & E. 413; S. C. 1 P. & D. 512. |                               |
| & D. 164.                               | (e) 7 B. & C. 785; S. C. 1 M. |
| (c) 8 A. & E. 429; S. C. 1 P. & R. 663. |                               |

if erroneous only, is good till set aside. The distinction between void and erroneous proceedings is explained in the *Marshalsea* case (a) (second point), where it is said, "a difference was taken where a court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or the minister of the court who executes the precept or process of the court, no action lies against them. But, where the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*;" and instances are given, viz. if the Court of Common Pleas hold plea in an appeal of death or robbery, it is *coram non judice*; but if the same Court, in a plea of debt, award a *capias* against a peer, "although the writ be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the sheriff is excused." The same distinction is recognised in *Turner v. Felgate* (b), *Barker v. Braham* (c), *Parsons v. Loyd* (d), *Philips v. Biron* (e). If, in a case like *Trevor v. Wall* (f), the judgment of the inferior court had not been reversed on error, because the declaration omitted to allege that the cause of action arose within the jurisdiction, and if execution had been had on the judgment, and an action had been brought against the plaintiff for so taking out execution, he would have been obliged to plead and prove that his cause of action did arise within the jurisdiction; *Evans v. Munkley* (g); and he might then have justified under the judgment. So in this case, if trespass had been brought against the Company for entering the plaintiff's land, and a special plea were pleaded, it would have been necessary to aver and prove all the facts necessary to give the sheriff jurisdiction, and then the Company would be protected by the inquisition. Of what use then can it be to state on the inquisition all such preliminary facts, which in any proceeding against the Company they

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(a) 10 Rep. 68 b.

(b) 1 Lev. 95.

(c) 3 Wils. 368.

(d) 3 Wils. 341.

(e) 1 Str. 509.

(f) 1 T. R. 151.

(g) 4 Taunt. 48.

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would have to aver and to prove aliunde, and of which the inquisition would be no evidence whatever? If indeed the inquisition had been quashed, it would afford the Company no protection whatever; but, so long as it remains a judgment, however erroneous, it "is binding and conclusive to all intents and purposes, upon all persons whatsoever," by the terms of the 138th section.

3. With regard to the first objection to the certificate, that it does not state there was any dispute whether the premises in question had been omitted from the schedule by mistake, it cannot be necessary that there should be even a dispute in fact to give jurisdiction to the certifying justices, for, if so, where the landowner admitted the mistake, the schedule could never be amended. If there is no dispute, the certificate is unnecessary.

With regard to the second objection, it is found that the "yard and garden" were parcel of and included in the description of the "house," and occupied with it; they would pass therefore as part of the house: *Plowd.* 171; *Bettisworth's case*(a); *Co. Lit.* 5 b, 56 b. Such gardens as are mentioned in the schedule are detached gardens.

4. The deviation into Allen Street is authorised by the 59th section, which provides that, if the line is taken within a certain distance of Allen Street, the Company shall purchase one side of the street. They have purchased the whole street. The verdict too finds that there has been no deviation from the parliamentary line.

5. The objection to the mode of paying the purchase money has been answered by the Court.

Ellis in reply. The argument, that the inquisition need not state the notice of inquisition, because such notice was an anterior act with which the sheriff had nothing to do, was used without success in *Rex v. The Mayor, &c. of Liverpool*(b); and in *Rex v. Croke*(c) it is clear that the justices were

(a) 2 Rep. 32.

(c) 1 Cowp. 26.

(b) 4 Burr. 2244.

not the parties to give the notice, for the notice was to be given antecedently to the application to the justices.

But it is submitted that the first thing the sheriff and jury in this case had to do was to ascertain whether those facts existed which alone could entitle them to exercise any jurisdiction. The cases referred to by Lord Abinger C. B. seem only to shew that the jury were to take no part in ascertaining such facts, for the contest in those cases was as to the right to begin and reply, which depends upon the onus probandi before the jury. But it by no means follows from those cases that the sheriff had not to inquire into all the facts essential to found his jurisdiction.

Even if the sheriff might *assume* all preliminary facts without inquiry, he was still bound to set out the facts assumed. It is impossible from this inquisition to know on which of the numerous cases in the 138th section the sheriff and jury have proceeded. Inferior courts are required to shew on what foundation they proceed, in order that the superior courts may see what the inferior court has professed to do, and so have the means of judging at once whether it has had jurisdiction. [Lord Abinger C. B. The inquisition is the only judicial proceeding. It refers to the warrant as the only preliminary fact necessary to give the sheriff jurisdiction. The warrant does not itself recite any preliminary fact, but it is not a judicial instrument, it is merely an act of one of the parties litigant.]

The sheriff and jury in this case are not a permanent court; quâ sheriff and jury merely, they have no jurisdiction. Their jurisdiction is born and dies with the occasion of its exercise. The present case, therefore, is much stronger than the ordinary cases in which inferior courts of a *permanent* nature have been required on the face of their proceedings to set out the grounds of their jurisdiction to act in the particular case. For here the statement of the preliminary facts is necessary to shew that the sheriff and jury were a court at all. Even in *Basten v. Carew* (a) and other

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(a) 3 B. & C. 649; S. C. 5 D. & R. 558.

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cases, referred to as shewing that any finding by a court of record is conclusive with respect to facts which the Court had to ascertain, it might have been shewn that the assumed court was no court at all, that the assumed justices were not justices.

The distinction therefore drawn from the *Marshalsea* case (a) and other authorities, to shew that a *voidable* judgment is binding until set aside, cannot avail the defendants, for here it does not appear that the Court itself existed; so that upon the face of them the proceedings may have taken place coram non iudice, and so be *void*. [*Maule J.* The special verdict finds every fact necessary to give jurisdiction, and that judgment was given by the sheriff. It seems now to be objected that the facts necessary to give jurisdiction were found by incompetent evidence, because they ought to have been proved by the inquisition itself, and are not there stated. Is not this a *nisi prius* objection, which cannot now be taken advantage of?] The special verdict contains no finding, apart from the inquisition itself, that the sheriff in fact gave any judgment, nor would any other mode of finding the judgment be good, because the statute requires the judgment to be in writing. This may be collected from section 140, which makes the inquisition a record; just as in *The Earl of Harborough v. Shardlow* (b) it was collected, from the section requiring the enrolment of the contract, that the contract must be in writing, and it was held that the Company had no title without proof of such a written contract. This inquisition therefore was necessarily set out, and may be impugned if it is not such an instrument as the act requires.

With regard to the payment of money, it is submitted that the payment stated in the special verdict is insufficient, and might have been repudiated by the Company. Section 160 allows the Company to enter upon lands on payment of the purchase money, and, if the landowner refuses to convey, then upon payment into the Bank of England to

(a) 10 Rep. 68 b.

(b) 7 M. & W. 87.

an account, "Ex parte Manchester and Leeds Railway Company," as thereinbefore directed, referring to the 153d section. By the 153d section, in case of such refusal by the landowner, "it shall be lawful for the *Company* to order the money so awarded to be paid into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Exchequer, to be placed to his account, to the credit of the parties interested in the lands," &c. Now by section 218, all orders are to be in writing and entered in a book. No such order is stated in the verdict. The funds of the Company may therefore have been appropriated to this payment without a proper authority, and the amount may be recoverable by the Company as money had and received.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court:—The question raised for the opinion of the Court below, upon this special verdict, was, whether the defendants below ceased to be tenants to the plaintiff below by the entry and eviction of the Manchester and Leeds Railway Company, under the powers and authority of the act 6 & 7 Will. 4, c. cxi.; for, if such entry and eviction was justified by the powers given by that act, then the defendants paid into Court more than was due for their use and occupation of the plaintiff's premises, and the judgment given for such defendants by the Court below ought to stand; but, if such entry and eviction was not justified, then the defendants still continued tenants notwithstanding the eviction, and are liable to a further sum for use and occupation beyond what was paid into Court, and in that case the judgment must be given for the plaintiff below.

On the part of the plaintiff, three principal grounds of objection against the validity of the proceedings of the Railway Company have been raised, and relied upon in argument; viz.

1. That the warrant and inquisition directed by the 138th section of the act do not state upon the face of them

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sufficient facts to shew any jurisdiction over the subject matter, and that consequently such warrant and inquisition, and the judgment also of the sheriff founded thereon, are altogether void. 2. That the certificate granted by the two justices under the 5th section of the act, upon the ground of an unintentional error having taken place in the description of the premises in the schedule to the act of parliament, is void, by reason of its not stating that there was any dispute. And 3. Because the yard and garden, parcel of the premises, are neither specified in the original schedule nor in the certificate.

Of these objections the first is that which is entitled to the greatest consideration. The authority, given by the statute to the Railway Company, to take the lands of individuals for the purposes of the act, where it is exercised adversely and not by consent, is undoubtedly an authority to be carried into effect by means unknown to the common law. And it is therefore contended, on the part of the plaintiff, that the same rule will apply to these proceedings, which is held to apply to all other inferior jurisdictions—that, unless sufficient appears, upon the face of the proceedings themselves, to shew the jurisdiction exists, such proceedings are altogether void. Admitting such to be the rule of law, and not further relying on the special finding by the jury, that all which was necessary to give jurisdiction under the statute did really and in fact take place, than to observe, that the whole objection is confined to the face of proceedings themselves, the question is, whether expressly or by necessary intendment, the proceedings do of themselves shew that they were warranted by the statute. And we are of opinion that, upon fair and necessary intendment, the jurisdiction appears upon the proceedings themselves.

The warrant and inquisition being annexed together, as stated in the special verdict, may be considered as one entire proceeding, and any deficiency existing in the one may be aided by reference to the other. And indeed it is obvious that, as no particular form is prescribed by the statute,

it must be sufficient if the jurisdiction is substantially made apparent upon the face of the documents, or is to be inferred therefrom.

Now it is to be observed that the statute in section 18 enumerates the several cases in which power is given to the Company to ascertain the amount or value of the purchase money of lands to be taken under the act, by the intervention of a jury; and, after specifying three distinct cases, viz. first, mere simple non-agreement as to the purchase money, secondly, the refusal to accept the purchase money, with notice and request that it may be referred to a jury, and thirdly, a neglect or refusal after notice to treat or agree for the sale, or an incapacity to make an agreement, or non-disclosure of the state of the title of the seller, the section concludes with this very general and comprehensive statement, "or in any other case where agreement for the purchase of lands required for the purposes of the act cannot be made." And we think the very circumstance of recourse having been taken by the Company to the compulsory means of ascertaining the amount of the purchase money by summoning the jury, and the proceeding to judgment in the regular mode pointed out by the statute, affords the natural and necessary inference that a previous agreement for the purchase could not be made. Such indeed appears to have been the opinion of *Littledale* and *Williams Js.* in the case of *Reg. v. Trustees of Swansea Harbour (a)*, which in its circumstances strongly resembles the present. The warrant states, upon the face of it, that it was issued by the Company pursuant to the powers for that purpose given to them by the act: the jury are directed upon the face of the warrant to be impanelled, "to inquire of, assess and give a verdict for the sum of money to be paid to the plaintiff (amongst others) for the purchase of the lands, &c. (amongst others) of the plaintiff, about to be purchased and taken under the authority of the act;"

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(a) 8 A. & E. 439; S. C. 1 P. & D. 512.

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words which imply necessarily, that such purchase had not then been completed, that *no sale* had been then agreed on, the terms *purchase* and *sale*, being correlative terms, and not being satisfied, unless a price had been agreed on between the parties. And again, in the inquisition, after the jury have ascertained and settled the amount, it proceeds thus, "I, the said sheriff, in pursuance of the said act, do pronounce and give judgment for such purchase money, so assessed by the jurors, according to the direction of the said act;" words, which import in themselves, that the settling the amount of the purchase money is a proceeding between adverse parties, a proceeding *in invitum*, and not the result of a preceding agreement.

And, if the cases relied upon on the part of the plaintiff are examined, they will all be found distinguishable from the present in this material point, that the omission, or want of averment on the face of the proceedings, which formed the objection in those cases, could not be supplied by any intendment from the facts stated in the instrument itself, or from the fact that the order or instrument itself was made.

Thus, in the case of *Rex v. Manning (a)*, the objection was, that it did not appear in the order "that there were no proper materials in or upon the wastes or common grounds in any place near the highway." In the case of *Rex v. Mayor of Liverpool (b)* the objection was, that the service of previous notice ought to have appeared upon the inquisition in order to give jurisdiction. In *Rex v. Croke (c)* the objection was, that it did not appear on the order that the mayor, aldermen and commons, in common council assembled, had adjudged the lands to be necessary; nor did it appear on the order that the defendant had had notice in writing. In *Rex v. Bagshaw and others (d)* the objection was again the want of notice to the defendant, which was essential to give the trustees jurisdiction. In

(a) 1 Burr. 377.

(b) 4 Burr. 3244.

(c) 1 Cowp. 26.

(d) 7 T. R. 363.

the case of *Day v. King and others* (a) the order was deficient in stating the party, for whom the order was made, to be a member of the Friendly Society. But in each of these cases, and in the others cited, it is obvious that it could not be contended, from the fact of the proceeding under the statute having taken place, that there had been a performance of the act or condition precedent, the omission to allege which performance on the face of the proceedings formed the ground of objection. As, for instance, the proceedings under the Highway Act, in the case of *Rex v. Manning* (b), furnished no inference whatever as to the non-existence of materials near the highway, and so of the rest. Here, on the contrary, it appears to us that it is impossible, upon reading the warrant and inquisition, to arrive at any other conclusion than this, that the Company must have proceeded on the ground that no agreement could be previously made.

There was a further objection to the inquisition, that no mention of the certificate appears therein. But we think it is a sufficient answer to this objection, that the effect of the certificate is simply to rectify the mistake or omission in the schedule to the act itself, and to extend the operation of the statute to the several lands, &c. included in the certificate, so as to place them precisely in the same situation as if they had been inserted in the original schedule of the act.

The other objections appear to us to possess less weight and difficulty. For, as to the certificate, it is objected that it does not set forth the grounds on which it was granted. But this objection to the certificate is virtually the same as that which has been already considered with regard to the warrant and inquisition. The only necessity for any certificate is, as stated in sect. 5, "in case of a dispute," as to any error in the description of lands, &c. in the schedule.

(a) 5 A. & E. 359; S. C. 6 N. & M. 845.

(b) 1 Burr. 377.

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There is no previous condition to be performed by the Company or any other person, in order to give jurisdiction to the certifying justices. They are to make their certificate in case of a dispute: and the fact of their being applied to, and granting their certificate, is not merely evidence of the dispute, but appears to be part of the very dispute itself.

And as to the third objection, that the garden and yard are not mentioned in the certificate or schedule thereto, which forms an objection as well to the certificate as also an objection to the authority of the Company to enter upon the same under the warrant and inquisition, it is to be observed that this objection is not one that is confined to the form of the certificate or the schedule thereto, but is in part a question of fact, viz. whether upon the evidence the yard and garden were included within the description of the house specified in the schedule to the certificate; and upon this point the finding of the jury is express, that "at the time of passing the act and thence hitherto the yard and garden were parcel of and included in the description of the said house specified in the schedule to the said certificate, and occupied therewith as such parcel thereof:" and upon such finding we think there is no objection in point of law that the yard and garden should pass. The authority in *Co. Lit.* 5 b is express, that by the grant of a messuage *or* house, the garden, orchard and curtilage do pass.

There was indeed one objection, raised in the course of the argument, but not much insisted upon, that the Company had deviated from the line authorised by the act, by coming within the prescribed distance from a newly laid out street, called Allen Street. We mention it only that it may not be considered as overlooked; for we think the answer given at the bar was quite satisfactory, that the Company had purchased the land constituting the newly laid out street and the railway.

We therefore think, notwithstanding the various objections which have been taken, the defendants below, on the finding of this special verdict, were entitled to the judgment of the Court, and therefore that the judgment of the Court below must be affirmed.

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Judgment affirmed.

*D.*

END OF HILARY VACATION.

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## EASTER TERM,

IN

THE FIFTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J.

WILLIAMS J.

PATTESON J.

WIGHTMAN J.

In the Bail Court,

COLERIDGE J.

WRIGHT *v.* WATTS.*Friday,  
April 29th.*

It is not necessary that a plea should contain two defences well pleaded, in order to be double; it is enough if it sets up two defences.

Plea, as to 11*l.* 3*s.* 6*d.*, parcel of a sum in an indebitatus count, that defendant accepted a bill drawn on him by plaintiff for that amount on account of the said sum; that the plaintiff indorsed the bill to B.

for a good consideration, who thence and to the time of commencing the action was the holder thereof. The plea then added that, when the bill became due, the defendant paid B., then being the holder of the bill, 5*l.* in satisfaction of so much of the bill, and that B. had commenced an action against the defendant for the residue.

*Held*, bad for duplicity.

**DEBT** for 22*l.* 7*s.*, being 11*l.* 3*s.* 6*d.* for goods sold and delivered, and the like sum for work and labour.

Plea, as to the sum of 11*l.* 3*s.* 6*d.*, parcel &c., the defendant says that after that sum, parcel &c. became due to the plaintiff as in the declaration mentioned, and before the commencement of this suit, to wit, on the 10th day of August, 1840, the plaintiff, for and on account of the said sum, parcel &c. drew a bill of exchange, and directed the same to the defendant, whereby the plaintiff requested the defendant to pay to the order of the plaintiff the said sum of 11*l.* 3*s.* 6*d.* four months after the date thereof, which bill the defendant then accepted, and delivered to the plaintiff for and on account of the said sum of 11*l.* 3*s.* 6*d.*, parcel &c., and the plaintiff then had and received the said bill on such account as aforesaid. That after the delivery of the said bill to the plaintiff as aforesaid, and before the commencement of this suit, to wit, on the day and year last

aforesaid, the plaintiff indorsed and delivered the said bill, upon a good and sufficient consideration, to one *Charles Beswick*, who, from the time of such indorsement until and at and after the time when this action was commenced, remained and was the holder of the said bill. That when the said bill became due, to wit, on the 15th day of December, in the year aforesaid, the defendant paid to the said *C. Beswick*, then being the holder of the said bill, and the said *C. Beswick* then received the sum of 5*l.* in full satisfaction and discharge of an equal sum, parcel of the amount of the said bill, and that for the recovery of the residue of the amount of the said bill the said *C. Beswick* then commenced an action against the defendant in the Court of Queen's Bench at Westminster, which action is still depending in the said Court. Verification, &c.

Special demurrer, on the ground that the plea is multifarious and double in this, to wit, that the plea alleges that the defendant accepted the bill of exchange in that plea mentioned, and that the plaintiff received the same for and on account of the said sum of 11*l.* 3*s.* 6*d.*, and that the plaintiff indorsed and delivered the same, upon a good and sufficient consideration, to one *C. Beswick*, who at the time this action was commenced was the holder of the said bill, which allegations shew a good and sufficient defence as to the whole of the sum of 11*l.* 3*s.* 6*d.*; and yet the plea proceeds to allege that the defendant, when the bill of exchange became due, paid to *C. Beswick*, then being the holder of the bill, the sum of 5*l.* in satisfaction of an equal sum, parcel of the amount of the bill, thereby shewing a further and other good and sufficient defence as to the sum of 5*l.*, even although at the time of the commencement of this action the plaintiff, and not *C. Beswick*, was the holder of the said bill of exchange. Also, that the plea proceeds to allege that *C. Beswick* had commenced an action against the defendant for the recovery of the residue of the amount of the bill, and which action was still pending, which would also be a good and sufficient defence as to the residue of the

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sum of 11*l.* 3*s.* 6*d.*, even although at the time of the commencement of this suit the plaintiff, and not *C. Beswick*, was the holder of the bill of exchange. Also, that the plaintiff is unable to take any single and sufficient issue on the plea, so far as the same relates to 5*l.*, parcel &c.; for, if the plaintiff merely denies that *C. Beswick* was the holder of the bill of exchange at the commencement of this suit, he thereby admits that *C. Beswick* was the holder thereof when the bill became due, and that the defendant paid to *C. Beswick* the sum of 5*l.* as in that plea mentioned; and if the plaintiff were merely to deny the last-mentioned payment, he would thereby admit that the bill was in the hands of *C. Beswick*, as the holder thereof for value at the commencement of this action, either of which facts would be a defence as to the sum of 5*l.*, parcel &c.

Joinder.

*W. H. Watson* in support of the demurrer.

*Addison* contra. The plea puts the plaintiff in no difficulty; he might have replied *de injuriâ*; or, if the plea is double, he might have replied double: *Chitty v. Dendy* (a), *Pascoe v. Vyvian* (b). But the plea is not double. A double plea contains two defences to the whole declaration. This plea does not bear the semblance of two defences, except as to 5*l.*; for the pendency of the action by *Beswick* is no defence whatever. The plaintiff, the drawer, may have paid the bill, and got it back from *Beswick*, before suing the defendant. If plaintiff had been indorsee from *Beswick*, with notice that *Beswick* had sued the defendant, the pendency of the action by *Beswick* would have been a defence: *Chitty & Hulme on Bills*, 224 (c), citing *Marsh v. Newell* (d). Even judgment recovered by *Beswick*, without satisfaction, would have been no defence. In *Tarleton v. Allhusen* (e) a purchaser of goods accepted a bill for the

(a) 3 A. & E. 319; S. C. 4 N. & M. 842.


(b) 1 Dowl. (N. S.) 939.

(c) 9th ed.

(d) 1 Taunt. 109.

(e) 2 A. & E. 32.

price, which the vendor indorsed over; and the indorsee recovered judgment on the bill against the purchaser, but did not take out execution: afterwards the vendor took up the bill, and received a mortgage from the purchaser, from which, however, there were no proceeds: and it was held that the vendor was not in point of law paid for the goods.

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*W. H. Watson* in reply. Pleas like the present, of which the object is to gain time by demurring to any replication that may be pleaded to them, are severely reprobated by Lord Abinger C.B. in *Fraser v. Welch* (a). It is not necessary that there should be two good defences well pleaded to make a plea double: it is enough that a plea appears to contain two defences, so as to embarrass the plaintiff in his replication.

LORD DENMAN C.J.—I cannot help seeing that the object of the defendant in pleading this plea is to gain time, by demurring to any replication that may be pleaded to it. Such a plea is certainly no great credit to the science of special pleading. I think this plea is double. To make a plea double, it is not necessary that it should contain two defences well pleaded; it is enough that it sets up two defences.

PATTESON J.—Mr. *Addison* was obliged to argue that a great part of the plea was nonsense, and endeavoured in this way to get rid of the charge of duplicity; but it is no answer to such a charge to say, that the double defence is not well pleaded, and that, if the part of the plea which contains seemingly a second defence stood alone, it would be demurrable, as containing no answer to the action.

WILLIAMS and WIGHTMAN Js. concurred.

*D.*

Judgment for the plaintiff.

(a) 8 M. & W. 634.

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## The QUEEN v. The Inhabitants of STOWFORD (a).

The examination of a pauper, after stating a settlement gained about twelve years since, on which he was removed from the parish of Stowford, proceeded thus, "I then went to Stowford, and lived with Mr. Jackman there under a yearly hiring for eleven months and a fortnight."

On appeal against the order of removal, the grounds stated were, "Because the pauper acquired a settlement in the said parish of Stowford subsequently to that acquired by him in our parish. Because the pauper acquired a settlement in the said parish of Stowford by hiring with one Mr. Jackman from Lady-day to the following Lady-day, and service under the same in that parish accordingly, subsequently to that acquired by him in our parish."

An objection, made on the trial of the appeal, that the appellants could not go into their case, because in their grounds they had not stated the time of the hiring and service, or the residence of the pauper, in the respondent parish, was overruled by the sessions.

*Held*, on a case from the sessions, that their decision was wrong, and that the defect in the grounds of appeal was not supplied by reading them with the examination, as they did not state that the service alleged by them with one Mr. Jackman was with the same person who was described in the examination.

ON appeal to the Devonshire Quarter Sessions in January, 1842, against an order for the removal of one *Williams* from the parish of Stowford to the parish of Broadwoodwiger, both in the said county, the sessions quashed the order, subject to the opinion of this Court upon a case.

The case set out the examination of the pauper, which, after alleging a settlement in Broadwoodwiger, proceeded thus:—"About ten years ago I went to Mr. Rundell, at Stowford, and lived from Michaelmas until Lady-day, and then went to Maristowe, and lived there eight months, and afterwards went to work until the following Lady-day, and then went to Stowford, and lived with Mr. Jackman there under a yearly hiring for eleven months and a fortnight."

The case then set out the grounds of appeal.

The following are the material grounds of appeal:—"Because the pauper acquired a settlement in the said parish of Stowford subsequently to that acquired by him in our parish. Because the pauper acquired a settlement in the said parish of Stowford by hiring with one Mr. Jackman from Lady-day to the following Lady-day, and service under the same in that parish accordingly, subsequently to that acquired by him in our parish."

The respondents objected that the appellants were not at liberty to go into evidence of the settlement in Stowford upon the form of the above grounds of appeal. The sessions overruled the objection, and quashed the order of removal.

(a) Decided in Michaelmas term, 1842 (Nov. 9th).

The question stated for the opinion of this Court was, whether on their grounds of appeal the appellants were at liberty to prove a settlement gained by the pauper in the respondent parish by hiring and service.

If this Court should be of opinion that the sessions were wrong in permitting proof of the settlement in Stowford, the order of sessions to be quashed.

*Kekewich* and *Greenwood* in support of the order of sessions. It is said that the sessions ought not to have allowed the appellants to go into evidence of their case, because the grounds of appeal were defective, inasmuch as they omitted to particularise the time of the alleged hiring and service, and to state the pauper's residence in the respondent parish. The objections are well founded, if the grounds of appeal are to be read alone. But the true construction is, that they do not set up any new case under 4 & 5 Will. 4, c. 76, s. 81, but are to be read as a plea to the examination. They refer to the hiring and service with *Mr. Jackman*, mentioned in the examination, and say that the service there mentioned was not a service of eleven months and a fortnight only, but that it was a yearly service, and so sufficient to give a settlement. If the examination and grounds of appeal are thus read together, the grounds of appeal are sufficient, for the examination states the date, the yearly hiring, and the residence, and the grounds of appeal supply the service for a year, so that all the ingredients of a settlement by hiring and service are stated, and with sufficient particularity. In *Reg. v. North Bovey (a)*, *Patteson J.* appears to have thought that the grounds of appeal might be properly read with the examination, but that the connection between the two instruments should be clearly made out. It is to be observed, however, that in the case cited the examination stated only a monthly hiring and the ground of appeal nothing more than "a settlement by hiring and service." So that the

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(a) 1 G. & D. 701.

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essentials of the settlement did not appear from the two documents, even though read together.

As to the alleged want of particularity, it was observed by Coleridge J. in *Reg. v. Bridgewater (a)*, "that the sessions would do well to constitute themselves the judges of the particularity requisite," and here the sessions by allowing the appellants to go into their case must be taken to have been satisfied as to the identity of the *Jackman* mentioned in the two instruments, and as to the particularity of the grounds of appeal with regard to time.

*Rowe and Merivale* contra. In *Reg. v. Old Stratford (b)* it was sought to escape from the authority of *Reg. v. The Justices of West Riding (c)*, because the sessions in the first-mentioned case found the grounds of appeal to be sufficient, but Lord Denman C. J. observed in his judgment "how have they found the statement of the grounds of appeal sufficient? subject to the opinion of this Court." This observation of his lordship disposes of the application of *Reg. v. Bridgewater (a)* also.

It has been admitted that the grounds of appeal are bad, unless they can be connected with the examination. Now the judgment of Patteson J. in *Reg. v. North Bovey (d)* shews that they cannot be so connected:—"if it had said expressly that the subsequent settlement had been gained by the hiring and service mentioned in the examination, a different question would have arisen. But, as the notice now is, the hiring relied on by the appellants may be a different hiring from that in the examination, for the examination is not referred to." There is no more reason for presuming the identity of the "*Jackman*" mentioned in the two instruments in this case than of the "*Stooke*" in the case cited. Suppose the appellants had set up a service with another person of the name of *Jackman*.—if the respondents had objected, the appellants might have answered successfully

(a) 1 G. & D. 265.

(b) 2 G. & D. 82.

(c) 1 G. & D. 706.

(d) 1 G. & D. 701.

that they had used the indefinite language "one" *Jackman*, and that the very absence of words of reference shewed that they did not mean the same person mentioned in the examination, and they certainly could not have been precluded from shewing a service with a different Mr. *Jackman*.

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LORD DENMAN C. J.—The first impression of any one reading these documents might very well be that the Mr. *Jackman* mentioned in them is one and the same person. But when the grounds of appeal are attentively looked at, it will be seen that there really is no reference in them to the Mr. *Jackman* mentioned in the examination, so that there are two persons mentioned and no averment is made of their identity. There was the same state of things in *Reg. v. North Bovey (a)*, and my brother *Patteson* considered whether the reference to the examination sufficiently appeared. He thought it did not, and I think he was right. Where the places mentioned are very small, and the names of persons very uncommon, there may be no uncertainty as to the persons meant, yet, on the other hand, the mention of a common name with reference to a populous neighbourhood, might give no information whatever, and it would be most inconvenient to lay down a different rule for the two cases. I think *Reg. v. North Bovey (a)* an authority binding upon us, and, as the sessions have asked our opinion, we cannot but say, that we think there was nothing for them to inquire into, and that their decision was wrong.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

D.

Order of Sessions quashed.

(a) 1 G. & D. 701.

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## The QUEEN v. The Inhabitants of HENDON (a).

The derivative settlement of a child, whose father has acquired a settlement by virtue of the possession of an estate or interest in a parish, is not itself a settlement by virtue of such possession within 4 & 5 Will. 4, c. 76, s. 68.

Where therefore the father, and his emancipated child, removed more than ten miles from the parish, in which the father had gained a settlement by possession of an estate or interest:—*Held*, that the child did not lose his settlement by the above section.

*Per Coleridge J.* the child, if unemancipated, would have lost his settlement by the operation, not of the above section, but of the general law of settlement.

ON appeal to the Middlesex Quarter Sessions, in January, 1842, against an order for the removal of *John Davies* from the parish of Hendon in the said county, to the parish of Enstone in Oxfordshire, the sessions quashed the order, subject to the opinion of this Court upon the following case:

The pauper was the legitimate son of *Thomas Davies*, and had not acquired any settlement for himself. In the year 1814, the pauper's father married *Sarah Gregory*, who at the time of the marriage was the yearly tenant and occupier of the Corn public house, situate in the appellant parish, at the annual rent of 9*l*. The pauper's father resided in and occupied the same house for several years after his marriage, and he continued to reside in the same parish until the pauper became of age, and emancipated. After the emancipation of the pauper, and after the passing of the statute 4 & 5 Will. 4, c. 76, both the father and the pauper removed to a greater distance than ten miles from the appellant parish, and continued beyond that distance until the pauper became chargeable to the respondent parish, and was removed by the present order.

The question for the opinion of the Court is, whether, under the circumstances stated, the pauper was settled in the appellant parish when the order of removal was made.

If this question be decided in the affirmative, the order of sessions is to be quashed; if in the negative, the order of sessions is to stand confirmed.

*Kelly*, in support of the order of sessions. The 68th section of 4 & 5 Will. 4, c. 76, enacts, "that no person shall be deemed, adjudged or taken to retain any settlement, gained by virtue of any possession of any estate or interest in any parish for any longer or further time than

(a) Decided in Michaelmas Term, 1842, (Nov. 9),

such person shall inhabit within ten miles thereof; and in case such person shall cease to inhabit within such distance and thereafter become chargeable, such person shall be liable to be removed to the parish, wherein previously to such inhabitancy, he may have been legally settled, or in case he may have subsequently to such inhabitancy gained a legal settlement in some other parish, then to such other parish." Under this section the sessions have rightly decided that the pauper has lost his settlement in the parish of Enstone. He never had any substantive settlement of his own there, but merely a derivative settlement from that of his father. The settlement of his father was by estate or interest in the parish, and the pauper's settlement derived from that must also be considered a settlement gained "by virtue of some possession of an estate or interest" in the same parish. The pauper therefore has lost his settlement by removing ten miles from the parish. It is true that the pauper gained the settlement not solely by virtue of an interest in the parish, but partly by being the son of a person who had that interest, but the section does not say by virtue "*only*" of any possession, and therefore the objection is of no weight. There is nothing in the section to indicate that the "possession" spoken of means the possession of the pauper himself: the words used are "any possession." It cannot be contended that the pauper had a settlement by parentage as such, for settlement by parentage is merely a common law consequence of the parent's settlement, and not a distinct head of settlement (a).

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*Rawlinson* contra was not heard.

LORD DENMAN C. J.—The case is quite clear. The settlement put an end to by section 68, is a settlement

(a) In *Res v. St. Matthew, Bethnal Green*, Burr. S. C. 582, it was argued that the children ought to follow the acquired settlement of their mother, and not the settlement of the father, which was only

a derivative one from their grandmother. But the Court did not accede to the argument, and said that there was no difference between an acquired and a derivative settlement.

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gained by the party's own possession of property in the parish.

WILLIAMS J. concurred.

COLERIDGE J.—The settlement of an emancipated child cannot be affected by any thing that happens to the father; and an unemancipated child of a person removing ten miles from his parish would lose his settlement, not by virtue of this clause, but of the general law.

WIGHTMAN J. concurred.

Order of Sessions quashed.

D.

#### The QUEEN v. The Inhabitants of SILKSTONE (a).

The examination, on which an order of removal was made, appeared in the body and in the jurat to have been taken before a single justice, the examination containing the words "the examination of A. B. taken before me, one of her majesty's justices," &c., and the

ON appeal to the West Riding Sessions, in October, 1841, against an order for the removal of *Ann Teasdale* and her children from the township of Silkstone to the parish, township or place of Cawthorne, both in the said riding, the sessions quashed the order, subject to the opinion of this Court on the following case:

One of the examinations whereon the said order of removal was made, was an examination of *Martha Chappell*, in which she stated that she well remembered the birth, at Cawthorne aforesaid, of *George Teasdale*, the deceased husband of the pauper *Ann Teasdale*, and that she, this examinant, was present when the said *George Teasdale* was

(a) Decided in Mich T. 1842, (Nov. 9).

jurat containing the words, "sworn before me, and I do hereby certify that the above examination was read over" &c. The examination was signed, however, by two justices.

The order was appealed against, and the ground of appeal was "the examination, on which the order is founded is bad, inasmuch as, though signed by two justices, it purports to have been taken by one justice only."

The sessions held the objection good, and quashed the order. But this Court, on a case stated, held that, as upon the face of the examination, it was doubtful whether the examination purports to have been taken before one or two justices, and as the ground of appeal did not object that the examination had not, in fact, been taken before two justices, the maxim, "omnia rite esse acta," was fairly applicable, and quashed the order of sessions.

born at Cawthorne aforesaid. At the foot of this examination was written "Sworn before *me*, the day and year first above written, and *I* do hereby certify that the above examination was read over and explained to the said examinant, previously to her being sworn thereto, who appeared perfectly to understand the same. *W. Bennet Martin, H. Watkins.*"

One of the grounds of appeal sent the respondents was, "that the examination of *Martha Chappell*, upon which the said order is in part founded, is illegal and bad, inasmuch as, though signed by two justices, it purports to have been taken before one justice only."

On the trial of the appeal, the counsel for the respondents opened as their case the birth settlement of the pauper's husband in the appellant township, as stated in the said examination, whereon the said order of removal had been made, and which birth settlement the respondents were then prepared to establish by evidence. Whereupon, and before any evidence was given, the counsel for the appellants objected that there was no sufficient examination to support the order, and that the same ought to be discharged for the insufficiency of the said examination, as pointed out in the ground of appeal above mentioned.

After hearing counsel on both sides on this objection, the Court of Quarter Sessions decided that the said order of removal must be discharged, inasmuch as the said examination of *Martha Chappell*, so signed as taken before two justices, was rendered a nullity, and could not be received, on account of the insertion of the words "*me*" and "*I*" in the jurat, where "*us*" and "*we*" ought respectively to have been found. The Court considered this usage of the singular instead of the plural of the personal pronoun in the jurat as a fatal objection to the examination, and the Court therefore considered that there was no examination disclosing any legal evidence of the birth settlement in question, and that the said order must be discharged. And the Court thereupon discharged the same order of removal

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accordingly, subject to the opinion of the Court of Queen's Bench upon their so doing.

The question for the opinion of the Court of Queen's Bench is, whether the jurat in question was such as to require the said Court of Quarter Sessions to reject entirely the examination on the face of which it appeared. If the Court of Queen's Bench should be of opinion that the sessions ought to have overruled the objection above stated, the order of the Court of Quarter Sessions shall stand quashed, and the said original order of removal shall stand confirmed.

The order of removal and the examination itself were also returned to the certiorari.

The order of removal recited, "Whereas complaint hath been made to us &c., whose names are hereunto subscribed and seals affixed, being two of her Majesty's justices" &c., and proceeded, "We the said justices, upon due examination of the premises" &c., and was signed *H. Watkins, W. Bennet Martin*.

The examination mentioned in the case of *Martha Chappell* was as follows:

"West Riding } The examination of *Martha Chappell*,  
 of Yorkshire. } &c. taken upon oath before *me*, one of  
 her Majesty's justices of the peace for the said Riding, the  
 16th June, 1841, who saith &c. (then followed her evidence.)

The mark X of *Martha Chappell*.

*Joseph Shaw*, Churchwarden.

*David Johnson*, } Overseers."

*Joseph Silverwood*, }

"Sworn before *me* the day and year first above written, and *I* do hereby certify that the above examination was read over and explained to the said examinant previously to her being sworn thereto, who appeared perfectly to understand the same.

*W. Bennet Martin*,

*H. Watkins*."

*Dundas* and Sir *G. Lewin* in support of the order of

sessions. It appears not from the jurat only, but from the body of the examination, that it was taken by one justice. This and the fact, which appears on the case, that the respondents offered to prove the birth settlement, and that they did not offer to prove that the examination was in truth taken by two justices, although they had distinct notice of the objection, fully justify the conclusion which the sessions have come to.

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*Erle* and *Pashley* contra. The ground of appeal is to be construed strictly, in order that the contending parishes may be prepared to try a definite issue; and this ground of appeal is merely that the examination "*purports*" to have been taken before one justice only, and it does not raise any objection that it was so taken in fact. The question therefore is, whether the form of the jurat, purporting that the examination was taken before one justice, is conclusive. [Lord *Denman* C. J. It seems from *Rex v. Emden* (a) that the jurat is not conclusive, but the examination itself says, "the examination of &c., taken upon oath before *me*, one of her Majesty's justices" &c.] The examination has been returned to the certiorari, but it is no part of the case. [Lord *Denman* C. J. We must refer to the examination, for the objection refers to it, and says it is bad.] The examination has the signature of two justices; the singular pronoun, therefore, in the body of the examination and in the jurat must be taken distributively, as the language of each justice. Suppose the attesting clause in a deed to be in the terms "signed, sealed and delivered in the presence of *me*," and to have two signatures at the foot of it, can it be doubted that the deed would be properly taken to be attested by two witnesses? The examination is not to be set aside for mere ambiguity. In *Rex v. St. Mary's, Leicester* (b), an order of removal was directed to the parish of Wing, in the county of Rutland, and also to the parish of St. Mary's, in the county of Leicester, and the words "county of Rut-

(a) 9 East, 437.

(b) 1 B. &amp; Ald. 327.

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land" were there written in the margin, and the justices were, in a subsequent part of the order, described as justices of the peace *for the county aforesaid*: it was held that it thereby sufficiently appeared that the removing justices were justices of the county of Rutland. In a case like the present, the maxim "*omnia rite*" &c. may be fairly applied, especially where the order of the removal, bearing the same signatures which the examination bears, runs throughout in the plural number, and contains the statement "we the said justices, upon *due* examination of the premises."

Lord DENMAN C. J.—This question has arisen entirely from the magistrates having neglected to comply with the usual practice in the manner of drawing up the examination. The ground of appeal is that, though the examination is signed by two justices, it "*purports*" to be taken by one only. The objection is very clearly taken, and it was pointedly relied upon at the trial of the appeal. Does the examination then purport to be taken by one justice only? I think, when we consider that the taking of the examination was a judicial act, which could not legally be performed unless by two magistrates, and that the examination and jurat cannot be said to do more than make it doubtful whether they state the examination to have been taken by two magistrates or one, that we may safely call in aid the presumption of "*omnia rite*" &c., and hold the examination good. I think the sessions were wrong, and their order must be quashed.

WILLIAMS J.—The question for our opinion is stated at the end of the case, and is whether the jurat was such as to require the sessions to reject the examination. I certainly feel some reluctance in agreeing with the rest of the Court. I do not see the utility of sustaining examinations, when nothing but a departure from the ordinary practice, which is so easy to follow, has exposed them to objection, and I am unwilling to get to the apices juris for the sole

purpose of setting up a blunder. The case no where states that the examination was in truth taken before two magistrates, and, if evidence had been tendered of the fact, I doubt whether it could have been received to contradict the jurat. Upon the face of the examination itself, the jurat being one way and the signatures the other, it was left in doubt whether one or two magistrates had taken the examination, and upon this evidence I doubt whether the sessions did not come to a right conclusion. But I cannot help seeing (and on that I found my judgment) that it was understood between the parties that all had really been rightly done; that the examination, though wrong in form, was right in fact, and that the appellants went to trial relying upon a mere flaw in the examination. For the objection being that the examination is bad because it "*purports*" to have been taken before one justice only, may be thought fairly to imply that the examination was really taken before two. I think that the examination, which is ambiguous, may be sustained on this ground.

COLERIDGE J.—I agree with my brother *Williams*, in regretting that due care has not been taken in drawing up this examination, and I go the length of saying I do not wonder at the decision of the sessions, for any one might infer, on looking merely at the body of the examination and the jurat, that the examination was taken before one justice only. But we are bound to give these proceedings the benefit of such legal presumptions as can fairly be applied to them. Now here the examination and jurat will bear the construction that the magistrates who signed the examination were both present when it was taken, and the personal pronoun, which is used in the singular, may apply to each magistrate separately. In this state of things, I think the presumption that all has been done rightly may fairly be called in to determine the right construction to be, that the examination was taken before both magistrates, for otherwise it must be imputed to the single magistrate, who did

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take the examination, that he assumed an authority which the law does not allow; and to both magistrates, who have signed the examination, that they have been guilty of misrepresentation and fraud, in making it appear that they were both present when the fact was not so.

**WIGHTMAN J.**—The examination has the signature of two magistrates. It is impossible to say to which of them the first person singular really applies, if it applies to one only; but it may apply severally to each of them. A promissory note in the form "I promise to pay," &c. signed by two persons, has been held to be the note of both the parties signing(a)." I think the pronouns "I" and "me" in this examination and jurat, are not to be applied to the magistrate first signing alone, or to either alone, but to each magistrate who has affixed his signature.

**D.**

Order of Sessions quashed.

(a) See *March v. Ward*, 1 & Hulme on Bills of Exchange, Peake's N. P. R. 130; and Clitty (9th ed.) 529

*Tuesday,*  
*April 20th.*

**JACKSON**, surviving Executor of **HAMER**, v. **MAGEE**.

**Assumpsit** for money paid.

Plea: the defendant's certificate under a fiat in bankruptcy,

that the money was paid for a debt of defendant, due before his bankruptcy, for which plaintiff was surety, and that plaintiff paid the money without any request from the defendant, except the request supposed to arise by law from the premises.

Replication: that, before the payment, defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which plaintiff could have proved or for which he could have received any dividend.

On special demurrer to the replication,

*Held*, that the certificate was a discharge from the claim, as the principal creditor might have proved, and, if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared; or, if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit.

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Third plea: as to so much of the first count as relates to the sum of 684*l.* 6*s.* 6*d.*, parcel, &c., that before the time of the paying of the said sum of 684*l.* 6*s.* 6*d.*, to wit, on the 31st May, 1838, the defendant, who had been adjudged bankrupt on the 16th April previously, duly obtained his certificate. That the sum of 684*l.* 6*s.* 6*d.* is claimed and alleged by the plaintiff to be due, and is sought to be recovered as so much money due to the plaintiff, as such surviving executor, for money paid for the use of the defendant by the plaintiff as such surviving executor, in discharge of a certain debt of the defendant, due to the Northern and Central Bank of England. That the debt so due was a debt for which *Hamer*, the deceased, had become liable in his lifetime, before the defendant became a bankrupt as aforesaid, to wit, on the 1st January, 1836, and for which *Hamer* was liable up to the time of his death, and for which the plaintiff and his co-executor in his lifetime were liable, and so remained up to the death of the co-executor, and for which debt, being a debt of the bankrupt, the plaintiff, as surviving executor, continued liable at the time of the defendant's bankruptcy and fiat against him. That plaintiff, as such surviving executor, so remaining liable, after the issuing of the fiat, to wit, on the 1st January, 1841, in respect of his said liability paid the debt to the Northern and Central Bank, without any request from the defendant, save and except the request supposed to arise by law from the premises in this plea mentioned. That *Hamer* had not, when he became so liable, notice of any acts of bankruptcy of the defendant, and that neither the plaintiff nor his co-executor had, when they became so liable, nor had the plaintiff, when he became so liable, notice of any act of bankruptcy of the defendant. Verification.

Replication: that before the time of the paying of the 684*l.* 6*s.* 6*d.*, the certificate in the plea mentioned had been allowed and confirmed, and a final dividend had been made of the estate and effects of the defendant as such bankrupt

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under the fiat; and that there was not at any time any debt, claim or demand, in respect of the 684*l.* 6*s.* 6*d.*, and of the payment thereof by the plaintiff, which, or in respect of which, the plaintiff could have proved or claimed against the estate of the defendant, as such bankrupt, under the fiat, or could or might have received any dividend or dividends from or out of the said estate and effects of the bankrupt. Verification.

Special demurrer, on the grounds that it is quite immaterial whether or not the plaintiff paid the amount in question before or after the allowance of the certificate, and that the allegation that such payment was made before the allowance is altogether irrelevant; and that it is quite immaterial whether the said payment was made before or after the said final dividend, and that the plaintiff's not choosing to make such payment until after such final dividend was made, does not alter the right of the bankrupt or affect his discharge, and that, for all that appears by the replication, either the principal creditor, the Northern and Central Bank, or the plaintiff, may have had the full power and opportunity of proving the debt or demand under the fiat, and, for all that appears, the Northern and Central Bank may have proved the debt or demand under the fiat; that the plea states matter which, in the express words of the Bankrupt Act, entitles defendant to be discharged from the debt, and the plaintiff by his replication attempts to answer the plea of such discharge, by stating merely that he could not have proved the debt or demand at any time, which must or may have been occasioned either by his own default in not paying and proving, or by the principal creditor having proved, in which case he would be entitled to the benefit of the dividends, if any; that the replication proceeds upon the supposition that the defence set up in the plea depends on the plaintiff's being able to receive dividends, which is not the case, as the demand would be proveable, whether there were any dividend or dividends or not; that the replication does not shew what is meant by a final dividend, nor

does it shew that there is no other estate or effects of the bankrupt coming to the assignees of the bankrupt, and that it is uncertain what is meant by the expression final dividend, and whether by that expression is meant the second dividend, or that no other estate or effects is or are coming to the assignees of the bankrupt, and no issue can be taken thereupon; that the plea shews that the liability of the plaintiff was incurred before the bankruptcy or fiat, and without notice of an act of bankruptcy, and that the payment was made by the plaintiff in discharge thereof, which renders the claim or demand proveable by the 52d section of the 6 Geo. 4, c. 16, yet the replication attempts to answer the same by an allegation that there was no debt, claim or demand in respect of the same, and of the payment thereof, in respect of which the plaintiff could have proved; without traversing or denying any of the facts alleged in the plea, which shew that the sum demanded was proveable, and, if the statement in the replication is intended as a denial of the facts mentioned in the plea, or of any of them, it should have concluded to the country; and if it is meant by the statement that the non-payment by the defendant, until after the fiat and dividend, prevented the sum demanded from being proveable, such statement is not law, and also that the same statement is argumentative and a traverse of matter of law, and that the replication is argumentative, and is in effect merely a statement that the facts alleged in the last plea do not shew a defence, and also that the replication is multifarious and double, inasmuch as it states the facts of the certificate being allowed and the dividend being made before the payment, as a defence, and also states that there was not at any time any debt, claim or demand in respect of the sum of money and of the payment thereof by the plaintiff, for or in respect of which the plaintiff could have proved a demand, and also states that the plaintiff could not have received any dividend or dividends in respect thereof, &c. &c.

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*Crompton* in support of the demurrer (a). The replication is bad. The plea brings the case within 6 Geo. 4, c. 16, s. 52 (b): 1 *Deac. Bankruptcy*, 291, *Westcott v. Hodges* (c), *Vansandau v. Corsbie* (d). In *Soutten v. Soutten* (e), which may be cited for the plaintiff, the surety neither paid the whole debt, nor a part for the whole, but a part in discharge of his own personal liability merely. The replication does not answer the plea, for it is immaterial whether the payment was made before or after the making the dividends; the rights of the bankrupt, whom the legislature intended to make a new man by his certificate, cannot be altered by the fact that the payment was delayed until after the allowance of the certificate or the making the dividends. The plaintiff and the Northern and Central Bank have had full opportunity of proving under the fiat.

With regard to the form of the pleadings. It would not have been proper to state in the plea that the debt was proveable; the actual facts of the case are stated, and they shew that the debt was proveable. There is no meaning

(a) The case was argued before Lord Denman C.J., *Patteson, Williams* and *Wightman* Js.

(b) The section enacts, "that any person who at the issuing the commission shall be surety, or liable for any debt of the bankrupt, or bail for the bankrupt either to the sheriff or to the action, if he shall have paid the debt or any part thereof in discharge of the whole debt (although he may have paid the same after the commission issued), if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends, and all other rights under the said commission, which such creditor possessed, or would be entitled to in respect of such proof; or, if the creditor shall not

have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment, as a debt under the commission, not disturbing former dividends, and may receive dividends with the other creditors, although he may have become surety liable, or bail aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

(c) 5 B. & Ald. 12.

(d) 8 Taunt. 550.

(e) 5 B. & Ald. 852; S. C. 1 D. & R. 521.

in the expression "final dividend" in the replication. The replication either amounts to a denial of the facts in the plea, and is wrongly concluded, or, if not, it is argumentative, or amounts to a denial of matter of law.

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*Tomlinson* contra. The plea is insufficient. It does not state that the plaintiff's payment to the principal creditor was made before a final dividend of the defendant's estate, or that the plaintiff's demand might have been proved under the fiat, so as to enable him to receive a dividend under it; or that the plaintiff fraudulently or wilfully delayed the payment, so as to prevent his claim from being proveable. It is for the defendant to make out that his certificate is a discharge. The receipt of dividends, or the opportunity of proving under the fiat, so as to be entitled to such receipt, if there are any dividends, is the consideration for the bankrupt's discharge. The 6 Geo. 4, c. 16, s. 52, enacts in terms that the surety, who shall have paid the debt, if the creditor shall have proved his debt, "shall be entitled to stand in the place of such creditor, as to the dividends and all other rights under the commission, which such creditor possessed, &c." This provision, therefore, can apply to no payment that is made *after* the period for proving and receiving dividends. It is an objection of substance, that this plea omits the averment that the plaintiff might have proved and received dividends. Such an averment is usual: *Vansandau v. Corsbie* (a), *M<sup>c</sup>Dougal v. Paton* (b), *Wood v. Dodgson* (c), *Clements v. Langley* (d). The 121st section of the 6 Geo. 4, c. 16, discharges the bankrupt from all debts "made proveable" under the commission, not from such as *may* be made proveable. The construction of sect. 52d, now contended for, is fortified by reference to 49 Geo. 3, c. 121, s. 8, by which the bankrupt was not discharged from the claim of his surety, who had paid the

(a) 8 Taunt. 550.

(b) 8 Taunt. 584.

(c) 2 Mau. & S. 195.

(d) 5 B. & Ad. 372; S. C. 2 N. & M. 269.

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creditor, except in cases of commissions "under which no dividend has yet been made, or under which the creditors, who have not proved, can receive a dividend equally in proportion to their respective debts, without disturbing any dividend already made." Suppose the creditor refuses to receive the debt from the surety, how can the surety then derive any benefit from the commission? Yet it cannot depend upon the conduct of a third party whether the surety has or has not a proveable claim against the bankrupt's estate.

The replication, which shews that the bankrupt's estate had been distributed before the debt was paid, is, at all events, an answer to the plea. If the payment of the debt was fraudulently delayed, in order to keep alive a claim against the bankrupt, notwithstanding his certificate, that might have been rejoined. It seems to be objected that the phrase "final dividend," as used in the replication, has no meaning, but it is clearly used in the statutory meaning, which it bears in the 107th and 109th sections of the 6 Geo. 4, by which a final dividend is directed to be made within eighteen months, except where there is some suit depending or estate outstanding.

*Crompton* in reply. There is no foundation for the difficulty suggested. The surety may always compel the principal creditor, if he should not choose to take the debt, to prove for the surety's benefit: *Ex parte Rushforth* (a), and the authorities there cited.

*Cur. adv. vult.*

Lord DENMAN C. J. at the sittings after term (May 14), delivered the judgment of the Court as follows:—"This was an action for money paid by the plaintiff, as executor of *Hamer*, to the use of the defendant.

The defendant pleaded his certificate under a fiat in bankruptcy, and that the money was paid for a debt of the

(a) 10 Ves. 409.

defendant, for whom *Hamer* was surety, and that the debt was due and *Hamer* liable for it before the bankruptcy, and that the plaintiff paid the money without any request from the defendant, except the request supposed to arise by law from the premises.

The plaintiff replied, that before the payment of the money the defendant had obtained his certificate, and a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which plaintiff could have proved, or for which he could have received any dividend. To this replication the defendant demurred specially.

We are clearly of opinion that the defendant is entitled to our judgment in his favour.

The debt was due before the bankruptcy; the creditor might have proved it under the fiat; and, if he had, the plaintiff would have been entitled to the benefit of that proof, and of any dividends which might be paid by the estate, either in reduction of the sum for which he was liable to the creditor, if that creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved under the fiat long before any dividend was declared; or, if the creditor would not take the money, the plaintiff might have compelled him to prove for his, the plaintiff's, benefit, as was clearly laid down in *Ex parte Rushforth* (a), and in a case of *Philips v. Smith*, in the Court of Exchequer, there cited.

The plaintiff cannot be allowed, by voluntarily delaying the payment of the debt till after a final dividend had been made, to deprive the defendant of the benefit of his certificate. The 55th section of 6 Geo. 4, c. 16, prohibits an annuity creditor from suing the surety, till he shall have proved under the commission for his benefit, and makes the certificate of the debtor a bar against both principal creditor and surety.

(a) 10 Ves. 409.

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The 51st section provides that debts due at a future day shall be proved with a rebate of interest, and shall be barred, and, though it does not mention the surety, yet the 52d section provides, in effect, that in all cases the surety shall be entitled and stand in the place of the principal creditor.

If, then, in the case of an annuity and a debt payable at a future day, the surety, though he may be called on long afterwards, is barred by the certificate, because the debt might be proved under the above provisions, much more shall he be barred when the debt was altogether due before the bankruptcy.

The statute 49 *Geo.* 3, c. 121, s. 8, which was referred to by the plaintiff's counsel, makes directly against him; for it takes the distinction between sureties in commissions before and after that act. It bars sureties, in cases of commissions already issued, only when they could receive a dividend equal to other creditors, without disturbing former dividends, because those sureties, having hitherto been unable to prove, had not been guilty of any laches, but it bars all sureties in cases of future commissions, because they are enabled to have the benefit of dividends equally with other creditors, unless by their own laches they forego that benefit.

The case of *M'Dougall v. Paton* (a), which was cited for the plaintiff, was not the case of a surety for payment of a debt, but of a surety for the performance of an agreement, which was not broken at the time of the bankruptcy, and therefore does not apply. The case of *Clements v. Langley* (b), which was also cited, was not a case of principal and surety, but of two co-sureties, to which it was held that the statute of 6 *Geo.* 4, c. 16, s. 52, did not apply.

The judgment must be for the defendant.

Judgment for the defendant.

D.

(a) 8 Taunt. 584.

(b) 5 B. & Ad. 372; S. C. 2 N. & M. 309.

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*Tuesday,  
May 3rd.*

STANLEY v. HAYES.

**COVENANT** by tenant against landlord. The declaration stated that by indenture of the 3rd March, 1841, between the defendant and the plaintiff, the defendant did "demise," &c. certain premises to the plaintiff, to hold from the 25th March then next, for twenty-one years, yielding and paying therefore, yearly and every year, &c. the clear rent of 60*l.* "And the defendant, by the said indenture, did covenant, promise and agree, to and with the plaintiff, that, he the plaintiff paying the said yearly rent of 60*l.* theretofore reserved and made payable at the days and in manner aforesaid, and observing, fulfilling and keeping all and singular the covenants, articles, clauses and agreements therein contained, which on his part are or ought to be observed, performed, fulfilled and kept, according to the true intent and meaning of the said indenture, should and lawfully might peaceably and quietly have, hold, use, occupy, possess and enjoy the said premises, with the appurtenances thereby demised or intended so to be, for and during the said term of twenty-one years (determinable as hereinafter mentioned), without any let, suit, trouble, denial, disturbance, eviction, or interruption whatsoever, *of or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from or under him or them,*" because the claim for land tax was a claim, not through him, but against him.

A distress upon demised premises for land tax due from the lessor before demise, is not a breach of his covenant that the lessee shall enjoy "without any disturbance, &c. of or by him, the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from or under him or them," because the claim for land tax was a claim, not through him, but against him.

Breach, (after the usual averments of entry and performance by the plaintiff,) that the defendant "did not nor would suffer or permit the plaintiff, for and during the continuance of the said term by the said indenture granted, peaceably or quietly to have, hold, use, occupy, possess and enjoy the said premises, with the appurtenances, by the said indenture demised, without the let, suit, trouble, denial, disturbance, eviction, or interruption whatsoever, of

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or by the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from or under him, them or any of them, according to the form and effect of the said covenant of the defendant in the said indenture in that behalf made as aforesaid, but, on the contrary thereof, the plaintiff in fact saith, that after the said indenture and during the continuance of the said demise, and whilst the plaintiff was possessed of the said demised premises, to wit, on the 24th June, 1841, one *John Pitman*, then being the collector of land tax, lawfully entered into and upon the said premises, and then seized and took certain goods and chattels, then being in and upon the said premises, as a distress for a certain sum of money, to wit, the sum of 3*l.* 7*s.* 8*d.*, before and at the time of the making of the said indenture and of the said demise due and owing from the defendant for and in respect of certain arrears of land tax, before the making of the said indenture and before the commencement of the said demise, rated, assessed and charged upon the said premises. By means whereof," &c.

General demurrer, and joinder.

*Peacock* in support of the demurrer. The generality of the covenant for quiet enjoyment, to be implied from the word "demise," is restrained by the subsequent express covenant: *Nokes's* case (*a*), *Gainsford v. Griffith* (*b*), *Line v. Stephenson* (*c*): and the distress for land tax was no breach of the express covenant, for it was a disturbance by persons claiming not "by, from or under the defendant," but against him.

*Byles* contrà. The tax distrained for was due from the defendant before the demise to the plaintiff; and by 38 *Geo.* 3, c. 5, s. 17, the tax is a charge upon the premises. The non-payment of the tax therefore, which necessarily

(*a*) 4 Rep. 80 b.

(*b*) 1 Saund. 60.

(*c*) 4 Bing. N. C. 678.

induced the distress, was a disturbance by the defendant within his express covenant, the terms of which are most comprehensive. A disturbance of a way is a breach of such a covenant; *Morris v. Edginton* (a); or a distress for rent due to a third person from a former occupier; *Dawson v. Dyer* (b). So also would an extent be; see *Brocking v. Cham* (c); or the lessor's attainer working a forfeiture. Yet these cases are no more disturbances "by, from or under" the lessor, than the present case. He referred also to *Lloyd v. Tomkies* (d).

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*Peacock* in reply. In *Dawson v. Dyer* (b) the declaration stated that the party distraining claimed through the defendant: here the distrainer claimed by title paramount. Undoubtedly the distress was an interruption of the plaintiff's quiet enjoyment; but it was not an interruption within the particular covenant in this case. The plaintiff is not without remedy; he might sue for money paid to the defendant's use. [Lord *Denman* C. J. What do you say if the premises had been taken under an elegit?] That also would be a claim against, and not through, the defendant.

LORD DENMAN C. J.—I think this case is not within the defendant's covenant. Plaintiff's quiet enjoyment has not been disturbed by any one claiming "by, from or under" the defendant, but by some one claiming "against" him.

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

Judgment for the defendant.

D.

(a) 3 Taunt. 24.

(c) Cited Vaugh. 121.

(b) 5 B. & Ad. 584; S. C. 2 N.

(d) 1 T. R. 671.

& M. 559.



1842.

*Tuesday,  
May 3d.*

Case for obstructing a window-light in the city of London by building.

Plea: that, by the custom of the city, the owner of a house on ancient foundations may at any time build on them so as to darken the window of his neighbour, though that also be ancient, unless there be some agreement to the contrary, and justification under the custom.

Replication: under 2 & 3 Will. 4, c. 71, s. 3, of twenty years' enjoyment of the light.

*Held*, on general demurrer to the replication, that the custom of London was no defence.

The **SALTERS' COMPANY v. JAY.**

**CASE** for obstructing lights. The declaration stated that before and at the time, &c., a certain messuage, &c. in the city of London, was in the possession of certain persons as tenants to the plaintiffs, the reversion thereof, &c. then and still belonging to the plaintiffs, in which messuage there then and of right were, and still of right ought to be, two windows through which the light and air, during all the time aforesaid, ought to enter into the said messuage, for the convenient occupation, &c., yet the defendant well knowing, &c., but intending, &c., whilst the messuage was so in the occupation of the said tenants, and whilst the plaintiffs were so interested therein as aforesaid, to wit, on the 21st August last, wrongfully, &c., erected a certain wall near the said windows, and wrongfully kept and continued the said wall, &c., by means of which several premises, the light and air were and still are hindered and prevented from entering the said windows, &c.

Plea: that in the city of London, from time whereof, &c. there hath been and still is a certain ancient and laudable custom, &c., that if any person or persons or body corporate hath or have a messuage or house in the city contiguous or adjoining to another ancient messuage or house, or to the ancient foundations of another messuage or house in the said city, of another person or persons, his or their neighbours there, and the windows or lights of such messuage or house as first aforesaid are looking fronting or situate towards, upon or over or against the said other ancient messuage or house, or ancient foundations of another ancient messuage or house of such other person or persons or body corporate, his or their neighbour or neighbours, so being contiguous or adjoining, although such messuage or house as first aforesaid, and the lights and windows thereof be and were ancient, yet such other person or persons, his or their neighbour or neighbours, being the owner or owners

of such other ancient messuage or house, or ancient foundations so adjoining, according to the custom of the said city, for all the time aforesaid, well and lawfully may and hath or have used, at his and their pleasure, his or their said other messuage so adjoining, by building to exalt or erect, or of new upon the ancient foundations of such other messuage or house so adjoining to build and erect a new messuage or house, to such height as the said owner or owners shall please, against and opposite to the lights and windows near or contiguous to such other messuage or house, and by means whereof to obstruct and darken such windows or lights, unless there be or hath been some writing, instrument, or record of an agreement or restriction to the contrary thereof in that behalf. That before and at the time, &c., to wit, &c., certain persons (in the declaration mentioned) were seised of a certain ancient messuage and house, and the foundations of a certain messuage and house, in the city of London, contiguous to the messuage of the plaintiffs; that they demised the said messuage, house and foundations to certain other persons (therein mentioned), for a certain term of years still unexpired, who entered, &c. The defendant then justified, that he, as servant of the lessees, exalted and erected their said messuage and house, and of new upon the said ancient foundations built and erected a new messuage and house against and opposite to the said windows in the said declaration mentioned, there being no writing, instrument or record of an agreement or restriction to the contrary thereof, at the time when, &c. Verification, &c.

Replication: that the access of light and air to and for the said messuage in the declaration mentioned, through the windows, had been and was actually enjoyed with the said messuage as of right and without interruption by the respective occupiers of the said messuage, for and during the full period of twenty years next before the commencement of this suit, and that the said access and use of light and air was not during the said twenty years, or any part thereof,

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enjoyed as aforesaid by or by reason of any consent or agreement expressly made or given for that purpose by deed or writing. Verification, &c.

General demurrer and joinder.

Sir *W. W. Follett* S. G. in support of the demurrer. The question is, whether the 3d section of 2 & 3 *Will.* 4, c. 71, which in terms enacts that the claim to the use of light shall be deemed indefeasible after twenty years' enjoyment, can be so construed as to destroy the custom of London, by which the owner of ancient foundations may build upon them at any time and to any height, although by so doing he may darken the ancient windows of another house adjoining. The words of the section are, "that when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, *any local usage or custom* to the contrary *notwithstanding*, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." The custom of London to build in derogation of ancient windows is not affected by the act. The sole object of the statute, as appears from the preamble, was to facilitate the *proof* of prescriptive rights, leaving the relation between such rights, when proved, and any others, precisely as it was before the act. The act recites that certain prescriptive rights are sometimes defeated by shewing the commencement of their enjoyment, and then enacts that the proof of their commencement shall not defeat them for the future, "but *nevertheless* such claim may be defeated in any other way by which the same is now liable to be defeated," and then assigns the different periods of enjoyment which shall render different rights indefeasible. All the provisions of the act are limited to securing the object announced by the title of the act, "An Act for shortening the Time of Prescrip-

tion in certain cases." The operation of the act upon the present case is, that proof of twenty years' enjoyment will now establish the plaintiffs' window to be ancient; but the privileges of the window, so established to be ancient, in relation to the counter privileges of the ancient adjoining foundation, are not enlarged, for the matter is altogether foreign to the purposes of the legislature. The custom of London, therefore, that an ancient light may be obstructed by building on the ancient foundation must prevail. Such a custom as the one relied upon was well known, and the legislature would have expressed itself in positive language, if it had been intended that the mere facility of proof afforded to some rights should make them, when proved, paramount to other rights, to which they must have given way before the statute. Probably the statute contemplated the case of customs, prevailing in some parts of the country, that a window may be built against, if its use has been discontinued for a certain time.

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*Kelly* contrà. The preamble cannot be resorted to when the enactment is clear: 2 Darris on Stat. 655. The custom of London, and of some other places, with respect to building on ancient foundations, to the prejudice of ancient rights, was well known, and the language in the third section was expressly directed to the subject, for there is no peculiar provision as to custom in the sections concerning other prescriptive rights.

With regard to the provision, "nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated," it is to be observed, that they do not occur at all in the third section, which makes the claim to light indefeasible after twenty years' enjoyment. With respect to other easements and to claims of profit, provided for in other sections, it is also to be observed that two periods are mentioned with respect to each of them. After the first period has expired, the right is not to be defeated by shewing that it had a modern origin, but

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"it may be defeated in any other way, by which the same is now liable to be defeated;" after the second period has expired the right is indefeasible, and the words just cited, which would of course be inconsistent with an indefeasible right, are omitted. The defendant gives no meaning to the words of the clause as to custom.

He then objected to the sufficiency of the allegation in the plea as to the foundations being ancient.

Sir *W. W. Follett* S. G. in reply. If it had been intended to take away any right, such as that of a person to use his own premises as he might have done before the act, or to destroy the customs of London (which the legislature itself has repeatedly recognized and confirmed) by a statute apparently passed with a different object, express terms would have been used for the purpose.

The last objection, if good, cannot be taken on general demurrer, and the plea states that the building now complained of was erected on ancient foundations.

LORD DENMAN C. J.—I think there is no ambiguity whatever in the third section; and we should not be justified in preventing its operation by resorting to the preamble to control it. It is enacted expressly that twenty years' enjoyment of light shall give an indefeasible right to it, notwithstanding any custom to the contrary, and we must suppose that the custom relied on in this plea was known to the legislature.

PATTESON J.—There is no ambiguity in the clause, so that we have no right to call in the preamble to construe the enactment. After twenty years' enjoyment the right is to be "indefeasible, any local usage or custom to the contrary notwithstanding," that is notwithstanding any custom which says it shall be "defeasible." Such a custom is pointedly provided against in the third clause, and is not noticed in any other.

**WILLIAMS J.**—It would make nonsense of the clause to say that the claim is to be indefeasible, and yet that it is liable to be destroyed by a particular custom. I see no reason for resorting to the preamble.

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**WIGHTMAN J.**—If a party for twenty years does nothing to shew his right of interfering with the light of an adjoining window, it is no great hardship that he should lose the right of doing so afterwards.

**D.**

Judgment for the plaintiff.

**The SCRIVENERS' COMPANY v. BROOKING.**

*Friday,  
April 29.*

**DEBT.** The declaration stated that the freemen of the city of London using the art or mystery of scriveners within the same city and suburbs thereof, commonly called Writers of the Court Letter of the City, from time whereof, &c. until the 28th January in the 14th year of *James 1*, and at the time of making the letters-patent thereafter mentioned, were an ancient company and fraternity of the city.

A bye law made by a prescriptive Company of the City of London (with power under letters-patent to make bye laws and fine for breach of them), that on the day of the election of the Master and Wardens of the Company, in which the freemen had no voice, two of the freemen should provide a dinner for all the members of the Company, and pay out of their own pockets such expenses thereof as

That *James 1*, on the said 28th January, by his letters-patent under the great seal, made the company a corporation to sue and be sued by the name of "The Master, Wardens, and Assistants of the Society of Scriveners of the City of London;" and further granted that for ever thereafter there should be one master and two wardens of the society to rule and govern the society and the men of the society; and further, that for the better assistance and council of the master and wardens there should be twenty-seven men, the more discreet and honestest persons of the society, to wit, the master and wardens for the time being and twenty-four other persons of the society, who should

should be incurred beyond a certain sum allowed for the purpose, or be fined in default, is a bad bye law.

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be named assistants of the society for all matters and causes of the society concerning its good government, to be chosen as in the letters-patent specified. And further, that the master and wardens and rest of the assistants for the time being, or the major part of them, from time to time for ever thereafter, for the wholesome rule and government of the society, statutes, rules, orders, constitutions and ordinances reasonable and agreeable to the laws and statutes of England, according to their sound discretions for the utility of the society, and for other lawful causes, as often as they should please, they should lawfully and with impunity have power to ordain and establish, and the same to put in execution without molestation or impeachment of his majesty, his successors, or any of his majesty's justices, &c. any statute, custom, &c. to the contrary notwithstanding, with power to change or revoke such ordinances, &c. And further, that if any person of the society, or any other person, the mystery aforesaid within three miles of the city using, should not fulfil all the lawful statutes, ordinances, constitutions, &c. so to be made, it should be lawful for the master and wardens and the rest of the assistants, or the major part of them, from time to time, to impose upon every person so offending, all such fines, amerciaments, and sums of money for his offence, as to the master and wardens, &c. should seem to be necessary and convenient.

That *James 1*, by the same letters, granted that the masters and wardens and the rest of the assistants, or the major part of them, yearly, upon the Tuesday after the Feast of St. *James* the Apostle, or at any other time, when to them it should seem more necessary, should have power to choose one fit person of the assistants to be master, and two other fit persons of the assistants to be wardens, and all the men of the mystery aforesaid, their servants and apprentices, to rule and govern, each of them being sworn faithfully to execute his office.

That the society accepted such letters-patent, and by reason thereof from thenceforth hitherto have been and still

are a body politic and corporate by the name above mentioned.

That the master, wardens, and assistants, on the 24th January in the 16th *James* 1, by virtue of the letters-patent did, for the better government of the society, duly advise that there should yearly be kept at the common hall of the society *two dinners*, one dinner for the master, wardens, and assistants, and the other the freemen of the company, to be kept yearly on the day of the election of the new master and wardens, and the other for the master, wardens, assistants, and livery of the company, yearly to be kept on the day when the lord mayor should take his oath at Westminster. And that the master, wardens, and assistants, or the major part of them, in convenient time before the said election day, should choose every year from time to time out of the livery, or out of the assistants of the Company, two of the elder and better sort of the Company, which should not have been master or wardens, to be stewards for the provision of both the dinners; and the stewards so to be chosen to have, towards the dinner to be yearly kept on the election day of the master and wardens for the time being, *3l. 6s. 8d.* a piece, and of every person of the Company *3s. 4d.*, and whatsoever should be more disbursed about the dinner should be discharged by the stewards; and for the other dinner the master and wardens to pay *40s.* a piece, and every one of the livery only to pay *3s. 4d.* a piece, and the residue of the charge to be borne by the stewards. And if any person so chosen to be steward should refuse to accept the same, or to perform the same, he should forfeit *10l.* for every such offence; which ordinance on the said 29th January was examined and approved by *Francis Lord Verulam*, then lord chancellor of England, *Sir Henry Montague*, Kt., then chief justice of the King's Bench, and *Sir Henry Hobart*, Kt. and Bart., then chief justice of the Common Pleas, according to the form of the statute in that case made.

That afterwards, on the 26th May, 1635, the master,

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wardens, and assistants ordained that the master, wardens, and assistants of the society, or the major part of them, in convenient time, at or before the election day of the new master and wardens of the society, should choose every year, as well out of the assistants of the Company as out of the *generality* and commonalty and residue of the freemen, two of the elder and better sort of freemen of the Company, which should not have been master or wardens of the society, to be stewards for the provision of the dinner, by former constitutions to be yearly kept, for the master, wardens, and assistants of the society and other the freemen of the Company upon the day of the election of the new master and wardens, *albeit* the said stewards or any of them for the time being to be chosen should not be of the assistants of the society or of the livery or clothing of the Company, the same allowances for the dinner to be made to the stewards as by the former ordinance, and any excess to be paid by themselves, and the same penalty of 10*l.* to be imposed for the offence of refusing the office; which said last-mentioned ordinance was examined and approved on the said 28th May by *Thomas Lord Coventry*, then lord keeper, and *Sir John Bramston*, Kt. then chief justice of the King's Bench, and *Sir John Finch*, Kt., then chief justice of the Common Pleas, according to the form of the statute, &c.

The declaration then averred that on the 19th June, 1839, the master, wardens, and assistants appointed Wednesday the 31st July in that year to be the day for electing the master and wardens, instead of Tuesday next after the Feast of St. James the Apostle, such 31st of July then seeming to them a more expedient day, &c. The declaration then averred that on the said 19th June, the master, wardens, and assistants chose out of the generality and commonalty of freemen of the Company, the defendant and one *Robert Burder*, then being two of the elder and better sort of freemen of the Company, and neither of them having been a master or warden of the society, to be stewards for the provision of the dinner to be kept in that year for the mas-

ter, wardens and assistants, and other the freemen, upon the day of election so appointed, that the defendant had notice at a convenient time beforehand, to wit, on, &c., and was required, &c., but that he refused to accept or execute the place or office of steward, and denied and omitted to disburse the monies, and to perform the other services belonging to the office, &c., and refused and neglected to provide or join with the other steward in providing the dinner, contrary to the form and effect of the act or ordinance aforesaid, whereby he hath forfeited, &c. 10/., and whereby an action hath accrued, &c.

General demurrer and joinder.

The point marked for argument by the defendant was "the point of law relied upon and intended to be argued in support of this demurrer is, that the bye-law is unreasonable and bad in law."

*Erle*, in support of the demurrer. [Lord Denman C. J. The point marked for argument by the defendant is so vague, that it gives us no information whatever; in future we shall pass over cases in which the point is not properly stated in our paper books.] The bye-law under which the defendant is fined for not providing a dinner on the day of the election of the master and wardens, in which election he, being a mere freeman, can take no part, is unreasonable, and has no tendency to promote the general interests of the Company. In *Carter v. Sanderson* (a), a bye-law for a member of a city company to provide a dinner for the livery on Lord Mayor's day, with an allowance towards the expenses thereof, was held bad, chiefly on the authority of *The Master and Company of the Framework Knitters v Green* (b), where the chief objection was, "that it is not said that this dinner was appointed to the end that the company should assemble and consult of things beneficial to the corporation. For it does not appear but that this was only for luxury." The same objection applies here, and there is the further objection, that by 41 Geo. 3, c. 79, s. 13, it is

(a) 5 Bing. 79; S. C. 2 M. & P. 164.

(b) 1 Ld. Raym. 113.

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compulsory upon a person to take up his freedom in this Company, in order to qualify himself to act as notary in London, or within three miles of the city.

He also objected that the declaration was bad on the further ground that it did not allege that the sum allowed towards furnishing the dinner had been tendered to the defendant.

Sir *W. W. Follett* S. G. contra. This case differs materially from the two cases cited. This is a prescriptive Company, and its bye-laws are not to be tested by modern notions; and in neither of those cases was the dinner given on a day when any corporate business was to be transacted. In the case from *Ld. Raymond*, it is expressly put in the judgment, "This bye-law to make the dinner cannot be good in this case of a *new* corporation, because it does not appear to what purpose the dinner is made, and it may be only for good fellowship. But if it had been to make the dinner to the end that the Company might assemble and *chuse officers*, or any other thing for the benefit of the corporation, it had been well enough. But in the case of *old* corporations by prescription, a bye-law to make a customary feast has been held good." There also the dinner seems to have been provided "only for the luxury of others," the steward not partaking of the dinner. Here the dinner is partaken of by all the members of the Company, and is provided on the day when the principal officers of the Company are elected, and when therefore it is desirable that there should be a general assembly of its members.

But again, the defendant in this case has refused altogether to take upon himself the office of steward; the bye-law as to the appointment of this officer is at all events good, even if it is bad for so much as regards the dinner; the defendant therefore has rendered himself liable to this penalty.

As the defendant refused to accept office altogether, it was not necessary to aver the tender of the allowance to

him, for the purpose of discharging a duty which could not arise until after he had taken office

*Erle* was not heard in reply.

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LORD DENMAN C. J.—The steward in this case is appointed merely to provide the dinner, so that the question is as to the dinner and nothing else. The result of the two cases cited is, that the dinner must be for the corporate benefit; no such benefit appears here. This dinner is given on the day of electing the masters and wardens of the Company. It might be reasonable that those who take part in the election should be refreshed. But the defendant, who is fined for not providing the dinner, is a freeman only, and is not one of the elective body. This dinner does not appear to be connected with the benefit of the Company at large, and the bye-law is bad.

PATTESON J.—This bye-law is unreasonable as regards the freemen. The freemen can take no part in electing the master and wardens, yet the stewards to provide the dinner may be appointed from the freemen, who have no business of the Company to attend to on the day of the dinner, and in this case the party appointed steward was one of such freemen. The Solicitor General argues that the penalty is for refusing to be steward. But the bye-law is objected to in toto, and the steward has really nothing to do but to provide the dinner.

WILLIAMS J.—It appears from the two cases cited that the dinner provided must in some way be in furtherance of the business of the Company. Here the party appointed to provide the dinner on the day of the election has no vote at the election, so that no benefit can arise to him or to any of his class from the dinner provided on the day of election. The Solicitor General puts it, that the steward may have other duties besides that of providing the dinner, but nothing of the sort appears.

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WIGHTMAN J.—This case is directly within the principle of the two cases cited. It seems from those cases that a bye-law may be reasonable, which provides for the refreshment of the Company when they are convened for business, but here the whole Company are not convened for the business of the day, but only a portion of the Company, and the defendant, who is to provide the dinner, does not belong to that portion of the Company which is concerned in the business of the day. In *Wallis's* case (*a*), which is cited in *Carter v. Sanderson* (*b*), it seems that the dinner was in aid of a custom, and in *Gee v. Willden* (*c*), which is also there cited, the party fined had a voice in the election, which took place on the day of the dinner.

D.

Judgment for the defendant.

(a) Cro. Jac. 555.

(c) 2 Lut. 1320.

(b) 5 Bing. 79; S. C. 2 M. & P. 164.



The QUEEN v. The Inhabitants of ST. MARTIN'S IN THE  
 FIELDS.

Wednesday,  
 April 27th.

By 10 Geo. 3, c. 75, poor rates may be assessed for the parish of St. Martin, Westminster, "upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other buildings, tenement or hereditament, or any other person or persons who by law is or are chargeable to the relief of the poor."

ON appeal by *Angela Burdett Coutts* to the Middlesex Quarter Sessions, in June, 1839, against a poor rate, made in April, 1839, for the relief of the poor of the parish of St. Martin's in the Fields, within the liberty of Westminster, and whereby the said *A. B. Coutts* was assessed in the sum of 1*l.* 13*s.* 4*d.*, being a rate at 4*d.* in the pound on a rateable value of 100*l.*, in respect of a private box in the Theatre Royal, Drury Lane, the sessions allowed the appeal, and ordered the rate to be amended by striking out the assess-

*Held*, that the lessee for a term of years of a private box in Drury Lane Theatre was rateable.

ment upon the said *A. B. Coutts*, subject to the opinion of this Court on the following case:

By the rate in question the proprietors of the Theatre Royal, Drury Lane, were assessed as follows—"The Theatre, Drury Lane Company, for the Theatre Royal, 1800*l*;" and the appellant as follows—" *Angela Burdett Coutts*, for box in do., 100*l*."

The appeal was brought in respect of the above assessment, and it is agreed that the box in question is in the parish of St. Martin's in the Fields, and that the rate was duly made, allowed and published, pursuant to a local act of parliament, 10 *Geo. 3*, c. 75, whereby the churchwardens, overseers of the poor, vestrymen, constables and other ancient inhabitants, in vestry assembled, are empowered and authorised to make rates or assessments for and towards the relief of the poor, and for the several purposes of the act, "upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement or hereditament, or any other person or persons who by law is or are chargeable and assessable for and towards the relief of the poor (*a*)."

By indenture of the 21st of February, 1795, *Richard Brinsley Sheridan* and *Thomas Linley*, proprietors of the new Theatre Royal, Drury Lane, in consideration of 6000*l*., paid by the late *Thomas Coutts*, Esq., did grant, bargain, sell and demise, for the term of 100 years, at a pepper-corn rent, unto him the said *Thomas Coutts*, his executors, administrators and assigns, all that box marked, &c., on the south side or Prince's side of the new Theatre Royal, Drury Lane, in the county of Middlesex, being directly and immediately under the box called the Stage Box, or His Royal Highness the Prince of Wales's Stage Box, which said box thereby demised or expressed so to be, contained in length from east to west 10 feet and 10 inches, little more or less, and in depth from the front to the door 7 feet 11 inches,

(*a*) Sect. 13.

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little more or less; and also all that vacant space or passage, containing 8 feet and 4 inches, or thereabouts, lying immediately between the back part of the same box thereby demised and the wall of the said theatre; the said vacant space, so lying behind the said box, to be made and converted into a room, and fitted up and furnished by and at the expense of the said *Richard Brinsley Sheridan* and *Thomas Linley*, their executors, administrators and assigns, for the sole and exclusive use of the said *Thomas Coutts*, his executors, administrators and assigns, as thereafter mentioned and expressed; and also full and free liberty of ingress, egress and regress, way and passage to and for the said *Thomas Coutts*, his executors, administrators and assigns, and his and their company, friends and attendants, and any other person or persons by his or their order or authority, or who should be entrusted with or have the possession of a key of the said box or room, from time to time and at all times, at his and their free will and pleasure, to go and return to and from the said box and room, over, across and along the stage of the said theatre, by and through a private door leading into, &c. and separate from that of the performers, and to have his and their carriage and carriages stand and take up and set down at the said private door, and all rights, privileges and appurtenances whatsoever to the said box, room and premises thereby granted and demised or expressed so to be belonging or in anywise appertaining, with free ingress and regress at any other usual or convenient door or place into and from the said theatre. The said indenture also contained covenants by the said *R. B. Sheridan* and *T. Linley*, within two months to cause the said vacant space to be converted into a room, and completely finished and fitted up with proper and necessary conveniences, as the said *T. Coutts* should desire, and to deliver the key of the said room when finished to the said *T. Coutts*, to be kept and retained by him, his heirs and assigns, for his and their own sole use and accommodation; a covenant for quiet enjoyment, and a covenant

for exclusive enjoyment, by the said *T. Coutts* and his friends, of the said box and room, and for repairing and ornamenting the same, by the said *R. B. Sheridan* and *T. Linley*; and there was also a proviso whereby it was provided that the said *T. Coutts*, his executors, administrators or assigns, should be at liberty at any time to surrender the said box, &c. or one moiety thereof, and if he should surrender the whole, or one moiety thereof, he, his executors, administrators or assigns, should receive out of the profits of the theatre and premises, or there should be paid to him or them, by the lessors, &c. for the residue of the term of 100 years, an annuity of 500*l.* or 250*l.* per annum.

The said indenture having been duly executed, the said *T. Coutts* took possession of and occupied and enjoyed the said box, pursuant to the terms, conditions and covenants of the said indenture, until the year 1812, when the said new Theatre Royal, Drury Lane, was destroyed by fire.

In the year 1812 a new theatre was erected under the powers of two acts of the 50 and 52 *Geo. 3*, by which the proprietors of the theatre were incorporated; and on the 27th of August, 1812, an indenture was executed between the committee of the Theatre Royal, Drury Lane, Company of Proprietors and the said *T. Coutts*, by which—after reciting the destruction and re-erection of the theatre, under the provisions of the acts of 50 and 52 *Geo. 3*, and the power of the said committee to grant leases of any boxes in the new theatre in the nature of private boxes, with an exclusive right of admission to such boxes on every night of theatrical performance, and reciting the claims of the said *T. Coutts* to a private box in the said new theatre, and the agreement of the committee that in lieu and compensation of all claims in respect of such former box, so purchased by the said *T. Coutts*, and in consideration of 3000*l.* to be paid by the said *T. Coutts*, a private box should be granted and demised to him, his executors, &c.—it was witnessed that in pursuance of the said agreement and in consideration of the premises, and of 3000*l.* to the said

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committee paid by the said *T. Coutts*, the said committee, in pursuance of the powers to them given by the said acts of parliament, and of all other powers enabling them in that behalf, did bargain, sell, demise and lease to the said *T. Coutts*, his executors, administrators and assigns, all that newly-erected whole and entire box, in the said newly-erected Theatre Royal, Drury Lane, situate and being on the ground tier next adjoining to the stage on the prompter's side of the same theatre, and also the lobby and the small room adjoining to and communicating therewith, situate behind the said newly-erected private box, and the free and exclusive use and enjoyment thereof and of every part thereof respectively, together with the full and free liberty of ingress, egress and regress, way and passage into and from the said theatre, and to and from the said box and room, every evening and night upon which any public entertainment, whether theatrical or musical, should be exhibited in the said theatre, to and for the said *T. Coutts*, his executors, administrators and assigns, or for any number of persons by his or their order or authority, not exceeding in any one night or time of performance the number of eight, and who should respectively be entitled to admission thereto upon producing to the doorkeepers, at the private box door of the said theatre, a ticket belonging to such box, or a note or order in writing under the hand of the said *T. Coutts*, his executors, &c. for his or their admission respectively; and also all rights, &c. excepting and always reserving out of this demise unto the said company of proprietors, their successors and assigns, free liberty at all times to paint, decorate and make such alterations in the front of the said private box, for the purpose of making the same uniform and like the fronts of the other private boxes in the said theatre, as the committee of management for the time being of the said company of proprietors should from time to time think proper, and excepting always and subject to such regulations, from time to time to be made by such committee of management for the time being, as

should be made by them respecting other private boxes in the said theatre, but so as such regulations did not prevent or hinder the said *T. Coutts*, his executors, administrators or assigns, from enjoying the exclusive liberty and use of the said private box and room, with all rights and privileges thereto belonging or appertaining, in the manner thereby intended and expressed to be granted and demised; to hold the same (except as before excepted) unto the said *T. Coutts*, his executors, administrators or assigns, from the 1st of October then next, for eighty-two years and a quarter, to commence from the 29th of September then next, yielding and paying the yearly rent of one penny. The said last mentioned indenture also contained covenants for quiet enjoyment, and by the lessors, at their own expense, during the said term, to preserve the said box and room thereby demised for the sole and exclusive use and accommodation of the said *T. Coutts*, his executors, administrators and assigns, and such other persons as therein-before named, and to repair, ornament and finish the same in the same manner as the private boxes and rooms adjoining thereto; and in case of destruction by fire of the said new theatre, or any other theatre to be erected on the site thereof, or that it should be necessary to make any alterations in the same which should interfere with the full and free use and enjoyment of the said box, room and premises, then, upon the re-edification of such theatre, and in the mean time and during the progress thereof, a box and retiring room, with all proper conveniences, in the said theatre or such new-erected theatre: and also that a box, with such accommodations as should be in the power of the said company to provide, in such other theatre as during the erection thereof should be opened for public performances, should be appropriated for the exclusive use of the said *T. Coutts*, his executors, administrators and assigns, in lieu of the said box, room and premises thereby demised, and be held by him and them under the same privileges as were granted in respect of the said demised box and

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room, and premises. The indenture also contained a covenant by the said *T. Coutts*, his executors, administrators and assigns, not to line or hang the front of the said box, or do anything to interfere with the uniformity of the said theatre.

After the execution of the said last-mentioned indenture, the said *T. Coutts* took possession of the said mentioned box, room and premises, and, according to the terms conditions and covenants of the said indenture last mentioned, the said *T. Coutts*, during his life, had the use and enjoyment thereof, and the said appellant, at the time of the making of the rate, had and now has the use and enjoyment thereof, according to the provisoes, terms and covenants of the said indenture. The said box and room are placed upon a level with the stage, and form a component part of the theatre, which is in the occupation and under the management of parties to whom it is let by the company of proprietors. The occupiers and managers have access to the said box and room from the other parts of the buildings by internal doors, of which they keep the keys. The approach to the box and room from the street is by an outer door, which opens to a staircase, by which staircase persons going to the other private boxes in the theatre, some of which are let nightly by the occupiers and managers of the theatre, ascend to those boxes. The outer door next the street, and also the staircase, are under the controul of the occupiers and managers of the theatre, and the door is closed and fastened by them at all times, excepting during the hours of performances. The performances usually continue from seven o'clock in the evening until twelve at night.

The several acts of parliament and the two indentures of demise herein-before mentioned, are to be treated and referred to as a part of this case.

The question for the opinion of this Court is, whether the appellant is liable by law to be assessed to the said rate in respect of the said box. If the Court should be of

opinion that she is, the order of sessions is to be quashed; if otherwise, to be affirmed.

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*Clarkson* and *Bodkin* in support of the order of Sessions (a). The appellant has no distinct occupation, and is a mere lodger who is not rateable; 1 *Nol. P. L.* 176 (b). In *Reg. v. Kensington* (c), the Kensington Cemetery Company were held rateable for the whole cemetery, although they had sold certain vaults therein, of which the purchasers had the keys and the exclusive use. The box in this case is no more a rateable tenement than a pew in a chapel, and the trustees of a chapel have been held rateable for the whole chapel, although they had let off the pews: *Rex v. Agar* (d). So in *Rex v. Ditchet* (e), it was said by *Littledale J.*, "by the statute of the 43rd of *Elizabeth*, the rate for the relief of the poor is to be on the occupier. The rate in this case must clearly have been made on the pauper's husband for the whole house, though he underlet part. In *Nolan's Poor Laws*, 176, it is laid down that no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier." It is immaterial that the box has been let for a term, for it cannot be distinguished in principle, notwithstanding, from a box for the season, or for a single night, or from a seat in the pit. If the appellant is rateable, the 23 *Geo. 3*, c. 23, s. 2, which makes the occupiers of separate apartments liable for the rate assessed upon the owner of the whole house, and the 30th section of 2 *Will. 4*, c. 45 (the Reform Act), which seems to enable lodgers to claim to be rated, would have been unnecessary.

In point of fact, the proprietors have actually been rated

(a) Before Lord *Denman C. J.*,  
*Patteson, Williams* and *Wightman*  
*Js.* *Williams J.* left the Court in  
the course of the argument.

(b) 4th ed.

(c) 4 *P. & D.* 327.

(d) 14 *East*, 256.

(e) 9 *B. & C.* 176; *S. C.* 4 *M.*  
& *R.* 151.

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for the whole theatre, so that if the appellant is also held rateable for her box, the same property will be made rateable twice over. [*Patteson J.* referred to *Rex v. Brown (a)*, and *Rex v. Bell (b)*.]

Sir *W. W. Follett* S. G. and *Chambers* contra. It is not necessary to contend that the appellant is rateable as the occupier of "land or house," within the 43 *Eliz. c. 2*, for the words of the local act in question are at all events large enough to comprehend the present case. The words in this act, "land, house, shop, wharf, warehouse, or any other building, tenement or hereditament," are clearly more extensive than the words descriptive of rateable property in the 43 *Eliz.*, and may therefore be construed to make property rateable which was not so previously: *Rex v. Justices of Buckinghamshire (c)*, *Colebrooke v. Tickell (d)*. Even under the general law, a stall to which a butcher had access on market days only has been thought to be a tenement within the 13 & 14 *Cur. 2, c. 12*; *Rex v. Caversham (e)*. That was a settlement case, and was therefore even stronger than if it had been a case on rateability to the relief of the poor.

*Cur. adv. vult.*

Lord DENMAN C. J. in the Trinity Term following, (May 28), delivered the judgment of the Court as follows:—The question in this case is whether Miss *Burdett Coutts* is liable to be rated under an act 10 *Geo. 3, c. 75*, in respect of a private box at the Theatre Royal, Drury Lane.

This box was demised to the late Mr. *Coutts*, under an act for rebuilding the theatre, for a long term of years. The lease grants an exclusive right to occupy the box and a small room adjoining, whenever any performances take place, and a private entrance to the same in common with other private boxes.

(a) 8 East, 538.

(b) 7 T. R. 598.

(c) 1 N. & P. 503.

(d) 4 A. & E. 916; S. C. 6 N. & M. 483.

(e) 4 B. & C. 683; S. C. 7 D. & R. 160.

The words of the 10 *Geo. 3*, c. 75, s. 13, are, that the persons there mentioned, &c. (His lordship read the portion of the section as set out in the case.) We are of opinion that the box in question is a tenement within the meaning of this act, and that it is held and occupied by the appellant so as to make her liable to be rated. The words are too large to admit of any other construction, and none of the cases referred to at the bar lead to any different conclusion.

It is argued that the proprietors are rated for the whole theatre, and that, if the appellant be also rated, the same premises will in effect be rated twice over. But this consequence by no means follows. The proprietors are rated in respect of their general possession of the theatre, of which the box in question forms a very small part, the rent being only one penny per annum, and may fairly be considered as not taken into account in rating the proprietors; whereas the appellant is rated in respect of this particular box. If however the consequence did follow, it would shew only that the proprietors were rated too highly, not that the appellant is not liable at all, which is the question submitted to us. The order of sessions must therefore be quashed.

*D.*

Order of Sessions quashed.

BAKER v. GREENHILL and others.

**ASSUMPSIT** to recover 30*l.* 7*s.* 6*d.* The declaration contained counts for money paid, money had and received, and money due on an account stated.

thrown ultimately on the owner of land, as between him and the occupier, though primarily as far as the public are concerned the occupier may be chargeable.

Where by certain acts of parliament it was provided, that the owners of certain lands, liable *ratione tenuræ* for the repairs of a bridge, might make rates on such lands for the more conveniently raising the fund necessary for such repairs, and the lessee of a portion of such lands covenanted with the owner to pay his rent "free and clear of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed or imposed upon the premises, or upon the lessor, property tax or duty only excepted,"

*Held*, that the covenant did not extend to make the lessee liable to pay a rate imposed on the demised premises for the repairs of such bridge.

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At common law the liability to repair bridges *ratione tenuræ* is

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Plea, non assumpsit. Issue thereon.

The case was tried before Lord *Denman* C. J. at the London sittings after Hilary term, 1840, when a verdict was found for the plaintiff for the above sum of 30*l.* 7*s.* 6*d.*, subject to a case, the material facts of which were to the following effect:

By an indenture of the 31st May, 1811, *William Greenhill*, the owner in fee of the premises hereinafter mentioned, demised to *T. Naylor* and *W. Vooght* two messuages and certain other premises for thirty-one years, from the 24th June next ensuing, at the yearly rent of 165*l.*; the lessees covenanting "that they should and would, yearly and every year during the said term thereby demised, well and truly pay or cause to be paid unto the said *W. Greenhill* the said yearly rent or sum of 165*l.*, as the same should become due and payable according to the reservations aforesaid and the true intent and meaning of the said indenture, *free and clear* of and from any land tax and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed, charged or imposed upon the said demised premises or any part thereof, or upon the said *W. Greenhill*, his heirs, executors, administrators or assigns, in respect thereof, (the landlord's property tax or duty only excepted.)"

The premises comprised in this lease are situate in the parish of West Ham, in the county of Essex, and together with other property situate in different parts of the parish, (altogether forming less than one fourth of the entire parish,) were formerly parcel of the possessions belonging to the monastery or abbey of Stratford Langthorne, in the said county, which lands were liable *ratione tenuræ* to the repair of two bridges, called Bow Bridge and Channelsea Bridge, and the road, causeway and wharfing, mentioned more particularly in the acts of parliament referred to in the case; and at the time of making the above indenture *W. Greenhill*, in respect of the said premises thereby de-

mised and by reason of his tenure thereof, was bound to contribute to support, maintain and keep in repair the said two bridges, road, causeway and wharfing. All the said lands were and are tithe free.

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The said lease and the term thereby granted is still unexpired.

The case referred to the 25 *Geo. 3*, c. 124. The 35th section of that statute recites that the two bridges above mentioned are to be repaired "by the owners and proprietors of lands and hereditaments heretofore parcel of the possessions belonging to the monastery or abbey of Stratford." Section 37 enacts that "inasmuch as the said abbey land owners stand, &c. liable to the repair of Bow Bridge and Channelsea Bridge as formerly, if any owner, proprietor or occupier of any parcel or parcels of the said abbey lands" shall not pay such sums of money as shall be payable by "the said abbey land owners, proprietors or occupiers," towards making such repairs, a justice may issue his distress warrant to enforce the payment. Section 38 authorises "the said abbey land owners, or any one or more of them," to call meetings for the making of rates for such repairs, "according to the rents or values of their respective lands and tenements as aforesaid." Section 41 "provided also that where any occupier or occupiers of any of the said abbey lands" should pay any sum "assessed on the owner or owners," "or which such owner or owners ought to bear or pay by virtue of this act," it should be lawful for the "occupier or occupiers" to deduct the sum so paid out of the rent payable to the owner.

By the 43 *Geo. 3*, c. lxvi. (local, personal and public), the said former act, which had been passed for a term only, was continued for twenty-one years.

By the 7 & 8 *Geo. 4*, c. cviii. (local, personal and public), intituled "An Act to enable the persons interested in the abbey lands and hereditaments, heretofore parcel of the possessions of the monastery or abbey of Stratford Langthorne, in the county of Essex, to raise money for repairing



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and maintaining the bridges and other works liable to be repaired and maintained by such persons," it is recited (sect. 1), "whereas the owners, proprietors, lessees and occupiers of divers lands, tenements and hereditaments," &c. are, "by reason of their respective tenures or otherwise," bound to repair the said two bridges; and it is enacted, "that from and after the passing of this act the affairs and concerns of the owners, proprietors, lessees and occupiers, of all the said lands, tenements and hereditaments, shall be conducted and managed under and subject to the several rules and regulations hereinafter mentioned, specified and contained."

The 2nd and 13th sections of this last act are set out in the judgment of the Court.

The plaintiff, before the making of the distresses and the payments of rent hereinafter mentioned, had by assignment become entitled to the residue of the term granted by the said indenture.

The defendants also, at the time in question, had become reversioners in fee under the will of *W. Greenhill*.

From the time of granting the said lease, down to the year 1836, *W. Greenhill* in his lifetime, and the defendants afterwards, always paid the rates and assessments made by virtue of these acts, in respect of the premises comprised in the lease, or allowed the amount thereof, when paid by the lessee or occupier, to be deducted from the rent payable under the said lease, without objection. In 1836 "*Greenhill's* executors" were rated. In 1837 and 1838 also the description "*Greenhill's* executors" appeared on the rate under a column headed "owner," but the name of *Tucker* was placed in the column headed "party assessed." *Tucker*, at the time of making the two last-mentioned rates, was in occupation as the plaintiff's agent, for the purpose of conducting the business of the plaintiff, which was carried on upon the demised premises. *Tucker*, by the plaintiff's authority, refused to pay the two last rates until compelled to do so by warrants of distress.

The plaintiff's claim is made up of the amount of the two rates so paid by him, and of the costs of the distress warrants. The defendants refused to allow the above sum to the plaintiff out of his rent, and threatened to distrain for the rent unless it was paid in full, whereupon the plaintiff paid the rent in full.

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The questions for the opinion of this Court are,

1. Whether the defendants are liable to the payment of the rates or assessments above mentioned, and to pay the plaintiff the said sum of 30*l.* 7*s.* 6*d.*, by the statutes referred to or otherwise, independently of the provisions contained in the said lease; and, if so,

2. Whether the said rates or assessments, made and paid as aforesaid, are taxes or deductions, which the lessee is bound to pay by the terms and within the intent and meaning of the covenant contained in the said lease.

If the Court shall be of opinion that the defendants are liable, and that the said rates are not taxes or deductions within the meaning of the said covenant, then the verdict found for the plaintiff, as above mentioned, is to stand; but, if the Court shall be of a contrary opinion, then a non-suit is to be entered. .

Sir *W. W. Follett* S.G. for the plaintiff (a). The history of the liability of the owners of the abbey lands to repair the bridges in question is given in a note to *Rex v. Kent* (b) and in *Rex v. Middlesex* (c). The tax payable for these repairs is not a parliamentary tax within the meaning of the plaintiff's covenant for payment of rent. A parliamentary tax is a tax imposed by parliament for the benefit of the state. The tax in question is not imposed by any of the acts referred to in the case, they merely provide for the more convenient adjustment of a liability previously existing; and the occupier is not made liable ultimately;

(a) The case was argued in M. T. last (Nov. 9), before Lord Denman C. J., Williams, Coleridge and

*Wightman* Js.

(b) 2 Mau. & S. 513.

(c) 3 B. & Ad. 201.

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he may be distrained upon, but he has his remedy over against the owner. The case states that the owner was liable at the time of granting the lease, and there is nothing in the acts to shift the liability. Nor did the plaintiff by occupying render himself liable to the repairs in question at common law. He is entitled therefore to recover the sum he has been compelled to pay for the defendants.

Sir *F. Pollock* A. G. contra. It is by no means clear that, at common law, the occupier is not the person ultimately liable for the repairs of a bridge repairable *ratione tenuræ*: *Rex v. Sutton* (a). But it is clear that the statutes in this case have cast the liability on the occupier. This is reasonable, for he is the party in possession, and has the substantial profits of the land. The occupier in this case is the party rated, and he cannot claim to be exempt unless he takes care to have the owners rated.

Even if this liability did not in its nature belong rather to the plaintiff as occupier, than to the defendants as owners, he has agreed to take it upon himself by his covenant. The sum paid by him was either a "parliamentary tax" or a "deduction:" *Waller v. Andrews* (b).

Sir *W. W. Follett* S. G. in reply, referred to the notes to *Rex v. Stoughton* (c) and to *Rex v. Kerrison* (d), to shew that the phrase "*ratione tenuræ*" signified a prescriptive liability, so as to be inapplicable to a lessee.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—This was an action, by the assignee of a lease for years of certain premises at West Ham, Essex, formerly part of the possessions of the Abbey of Stratford,

(a) 3 A. & E. 597; S. C. 2 N. & M. 57.

(b) 3 M. & W. 312.

(c) 2 Wms. Saund. 158 d.

(d) 1 Mau. & S. 435.

against the assignees of the reversion, to recover a sum of 30*l.* 7*s.* 6*d.*, which the plaintiff had been compelled to pay towards the repair of two bridges, which the proprietors of the demised premises and of other lands formerly belonging to the Abbey of Stratford, were bound to repair *ratione tenuræ*, and the question is whether, either by the terms of the lease under which the plaintiff held, or by the acts of parliament referred to in the case, or by the common law, the plaintiff was chargeable with the whole or any part of the money raised for the purpose of such repair.

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With respect to the liability at common law to the repair of bridges *ratione tenuræ*, the result of the authorities seems to be to throw the charge ultimately upon the owner; though primarily, as far as the public are concerned, the occupier may be the person chargeable by indictment in case of non-repair: *Reg. v. Bucknal* (a), *Hawk. P. C.* bk. 1, c. 77, s. 3, and the cases there cited: and it would seem from those authorities that, if the owner of lands charged with the repair of a bridge *ratione tenuræ* suffer it to be out of repair, and the occupier of the land be indicted and fined, he would be entitled to look for reimbursement to the owner, who ought to have repaired, and who holds the land by the service of repairing the bridge.

Independently then of the lease and the acts of parliament, the lessee would not in this case, as between him and his lessor, the owner of the premises, be liable to the charge of the reparation of the bridges. But the lease contains a covenant for payment of the rent free and clear "of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, charged or imposed upon the demised premises then or thereafter, or upon the lessor in respect thereof." It is contended that the amount assessed in respect of the premises for the bridge is a parliamentary tax within the meaning of the covenant. We are, however, of opinion that the acts of

(a) 7 Mod. 98.

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parliament for enabling the persons interested to raise the necessary funds for repairs of the bridges, by contribution amongst themselves, do not impose any tax within the meaning of the covenant. The charge was already created, and the acts merely supply a more convenient mode for raising the necessary funds to meet it; and we therefore think that the lessee was not liable by his covenant to be charged with the amount in question.

It is however contended, on the part of the defendants, that, though the plaintiff may not be liable to the charge either by the terms of the lease or at common law, he is so to some extent at least, if not to the whole, by virtue of the acts of parliament referred to in the case. These acts are three in number; the 25 *Geo. 3*, c. 124; the 43 *Geo. 3*, c. 66; and the 7 & 8 *Geo. 4*, c. 108, which is the act now in force, the two former having expired.

The first of these acts, both in the recitals and the enacting clauses, treats the owners and proprietors of the abbey lands as the persons chargeable with the repairs and to contribution amongst themselves; and, though in case of non-payment distresses may be made upon the occupiers of the land, the latter are enabled to deduct the amount from the rent; nor is there any clause in that or the 43 *Geo. 3*, c. 66, to fix lessees or occupiers with any portion of the burthen. It is however contended for the defendants, that the 7 & 8 *Geo. 4*, c. 108, expressly authorises and directs an apportionment of the charge between the owners and their lessees, according to their several interests, and that the rate which the plaintiff was compelled to pay was defective in not making such an apportionment.

The act undoubtedly does contain clauses which, at first sight, would appear to favour such an argument; but, taking the whole act together, we are of opinion that all the clauses are reconcilable with the general liability of the owners and proprietors, to the exclusion of the lessees, and that it was not the intention of the legislature to impose upon the lessees or occupiers any charge to which they were not otherwise liable.


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The 13th sect. was mainly relied upon for the defendants. By that section the owners, proprietors, lessees, and occupiers of the lands are empowered, at a meeting to be held under the act, to make an assessment by a pound rate upon all such owners, proprietors, lessees or occupiers, according to the rents or values of the respective lands, tenements or hereditaments, and according to the several interests of the owners, proprietors, lessees and occupiers thereof respectively, and to apportion such rates according to such several interests, and to moderate or regulate such rates with respect to any houses, new buildings or improvements, in such manner as shall be agreed on by the major part of the persons present at any such quarterly or special general meeting. But, by sect. 2, not more than one person is entitled to vote at any meeting in respect of the same premises, and, if more than one person claims to vote in respect of the same premises, the right of voting is to be in the person who is ultimately to pay the rates or allow them out of the rent. The terms of the 13th sect. will be satisfied by applying it to cases of contribution between owners having different interests in their respective properties, and between landlords and tenants, where the latter may have covenanted to pay the rent clear of any deduction on account of the charge, without interfering with the general rule that in the absence of such a covenant the owner is liable to the charge.

In this view of the case it appears to us that the rate sufficiently indicated the charge and the party chargeable, and that the amount ought to have been allowed by the defendants; and consequently that the plaintiff is entitled to judgment upon both the questions submitted to the Court.

D.

Judgment for the plaintiff.



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Friday,  
May 6th.

The QUEEN v. The LONDON and GREENWICH RAILWAY  
COMPANY.

By sect. 46 of the London and Greenwich Railway Act (3 & 4 Will. 4, c. xlv.), if the Company wish to buy part of certain "properties" therein mentioned, they cannot compel a sale unless they buy the whole of such "properties."

By sect. 47 the owner of any "house, manufactory, ground or building," within 50 feet of the railway, may call upon the Company to purchase such "house, manufactory, ground or building."

*Held*, that, where a piece of ground, taken under one lease, contained a principal dwelling-house and garden occupied by a manufacturer, a manufactory, smaller dwelling-houses in the occupation of under-

*THESIGER*, in Hilary term last, obtained a rule, calling upon the said Company to shew cause why a mandamus should not issue, commanding them to issue a warrant to the sheriff of Surrey, in the manner directed by the statute passed for making the said railway, the 3 & 4 Will. 4, c. xlv. s. 47 (local, personal and public), commanding the sheriff to impanel, &c. a jury to assess the sum of money to be paid by the Company to Messrs. *N. Slee*, *W. Payne*, and *E. R. Stee*, for the purchase of their interest in certain ground, buildings and premises belonging to them, situate in Church Street, in the parish of St. Mary Magdalen, Bermondsey, in the said county, and the sum of money to be paid by way of compensation for the loss, damage and injury which have accrued to such property, in respect of improvements, tenants' fixtures, machinery and otherwise, and for the future damages, as well temporary as perpetual; and also for all recurring damages done and sustained to the said property, by reason of the said railway, and the works thereof, having been erected *within 50 feet* from the said property.

By section 45 of the 3 & 4 Will. 4, it is enacted, "that if any corporation or other party, by this act authorised to sell and convey any lands, tenements or hereditaments, shall be applied to by or on behalf of the said Company to treat for, sell, dispose of or convey any part of any house, warehouse, building or manufactory, in the actual occupation of one person, or of several persons jointly, and shall by notice in writing, to be left with the clerk of the said Company, within twenty-one days after such application, signify his inclination or desire to treat for, sell, dispose of and convey

tenants, and the principal dwelling-house and garden only were within the 50 feet, and the Company did not wish to buy any part of the property, that the owner could not compel them to buy more than the dwelling-house, yard and garden.

the whole of such house, warehouse, building or manufactory; and if it shall happen that the said Company shall not think proper or be willing to purchase the whole of such house, warehouse, building or manufactory, then and in every such case nothing in this act contained shall extend or be construed to extend to compel such corporation or party interested therein to treat for, sell, dispose of or convey, or to authorise the said Company to take or use part only, or less than the whole of such house, warehouse, building or manufactory, anything herein contained to the contrary thereof in anywise notwithstanding."

By section 46 it is recited, that certain persons therein mentioned, and among others "*Messrs. Vickers and Slee*," are "owners or lessees of different properties, consisting of divers messuages, buildings, manufactories, tanneries, garden ground, &c. and other hereditaments, through which the said railway is intended to pass, or which may be required for the purposes of this act, and it may be extremely injurious to such owners or lessees, or their heirs, successors, executors or administrators, if the said Company were not compelled to purchase the whole of any such properties respectively belonging to such owners or lessees, through which the said railway is intended to pass, or which may be required for the purposes of this act, if required by the respective owners or lessees thereof so to do;" and it is then enacted, that if *Messrs. Vickers and Slee*, or the other persons therein mentioned, "shall be respectively applied to by or on behalf of the said Company to treat for, sell, dispose of or convey, for the purposes of this act, any part of any property now respectively belonging to them, &c. as such owners or lessees, and the said several owners and lessees hereinbefore named, or their respective heirs, &c. shall by notice in writing, to be delivered to the treasurer, clerk, or any one of the directors of the said Company, signify his or their inclination to treat for, sell, dispose of and convey the whole of such property, belonging to any of the owners or lessees aforesaid, and it shall happen that

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the said Company shall not think proper or be willing to purchase the whole of such property, then and in every such case nothing in this act contained shall be construed to extend to compel" Messrs. *Vickers* and *Slee*, and the said persons therein mentioned, "to treat for, sell, dispose of or convey, or to authorise the said Company to take or use part only, or less than the whole of such property so respectively belonging to them the several owners or lessees, any thing hereinbefore contained to the contrary notwithstanding."

Section 47 enacts, "and whereas the said railway is intended to pass through, over or along divers streets, lanes, and other public thoroughfares, in the parishes of St. Mary Magdalen, Bermondsey, and St. Paul, Deptford, and also close to or adjoining divers dwelling-houses, manufactories, grounds and buildings in the same parishes, and it may happen by reason thereof that the said houses, manufactories, grounds and buildings may become greatly deteriorated in value; be it therefore further enacted, that in case the owner, lessee or occupier, or other person interested in any house, manufactory, ground or building, within the said parishes of St. Mary Magdalen, Bermondsey, and St. Paul, Deptford, or either of them, which shall be *situate within 50 feet* of such railway, shall by notice in writing, to be left at the office of the said Company, require the said Company to purchase his rights and interests in such houses, manufactories, ground or buildings, it shall be lawful for the said Company, and they are hereby required, within thirty days after the service of such notice to treat for the purchase of his interest in the houses, manufactories, ground and buildings mentioned in such notice, and for the compensation, recompence or satisfaction to be made to him, for any loss, damage or injury in respect of any improvements, tenants' fixtures, machinery or otherwise; and in case the party so giving such notice and the said Company shall not agree as to the amount or value of the satisfaction, recompence or compensation, to be paid for

the value of such houses, manufactories, ground and buildings, improvements, tenants' fixtures, machinery or otherwise, then the amount or value of such satisfaction, recompence or compensation, shall be ascertained and settled by the verdict of a jury, in the manner hereinbefore directed for ascertaining and settling the value or recompence for other lands, tenements, hereditaments and premises, to be taken or purchased for the purposes of this act."

By the 3 & 4 *Vict.* c. cxxvii. (local, personal and public), the Company were empowered to widen their railway, by forming two additional lines of railway thereon, on the portion thereof which is between the junction of the London and Croydon Railway and the terminus near London Bridge.

The persons mentioned in the 46th section of the former act, as "*Messrs. Vickers and Slee*," and stated among others therein named to be owners or lessees of property through which the railway was intended to pass, are *N. Slee* mentioned in the rule, and one *J. Vickers*, who, at the time of the passing of the 3 & 4 *Will.* 4, were in possession of the premises mentioned in the rule as lessees thereof, upon part of which they carried on the business of vinegar makers in copartnership. *N. Slee* and the other two persons mentioned in the rule are the assignees of *Messrs. Vickers and Slee* for the unexpired term of sixty-one years, and carry on the same business of vinegar makers upon a portion of the same premises. The premises were a parcel of ground containing one principal dwelling-house and attached yard and garden in the occupation of *N. Slee*, and five smaller dwelling-houses in the occupation of tenants, a brewery, vinegar manufactory, warehouses, sheds, stables, coach-houses, cooperages, stoves, vaults and buildings. The parcel of ground contains on the east side, next Church Street, about 226 feet, on the south side about 162 feet, on the west side about 260 feet, and on the north side, being the side next to the London and Greenwich Railway, about 180 feet.

Under the powers of the 3 & 4 *Vict.* the Company had

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widened the railway so as to bring it within 50 feet of part of the principal dwelling-house and yard and garden occupied by *N. Slee*. The remainder of the principal dwelling-house, yard and garden, and also the rest of the premises, were more than 50 feet from the railway.

The Company were willing to purchase the whole of the principal dwelling-house, yard and garden.

Sir *W. W. Follett* S. G. and *W. J. Alexander* now shewed cause. This application proceeds upon the 46th section, which has nothing to do with the case, for the Company do not want any part of the property in question. They are willing to purchase so much as is within 50 feet of the railway, and this is all that can be required of them by the 47th section. If they can be compelled to take also other premises, quite detached from those which are within the 50 feet, merely because all are held under the same lease, the most absurd consequences would follow, in the case of any great proprietor, whose property might run through half a parish.

*Thesiger*, *Erle* and *Wordsworth* contra. The consequences may be equally absurd if the Company have to take no more than the single building within 50 feet, when it is one of several which are all employed for a common purpose. Suppose every portion of these premises were within the 50 feet, except the building in which the manufactory is actually carried on, the construction contended for by the Company might leave the manufactory isolated and inaccessible.

Even if the Company are not compellable to purchase more than the house, yard and garden, still this rule must be made absolute to assess the compensation to be paid for the injury done to the rest of the property. By section 51 of the 3 & 4 Will. 4, compensation for damage is to be ascertained separately from purchase-money. They referred also to sections 61 and 62, to *Bell v. Hull and Selby Rail-*

*way Company (a)*, and *Reg. v. Eastern Counties Railway Company (b)*, to shew the enlarged sense of the word "injury," and to *Lister v. Lobley (c)*, to shew the enlarged sense of the word "owners," in the 47th section.

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LORD DENMAN C. J.—It would seem that this application must have been made under the 46th section, which says that, if the Company desire to take part of a property, they must take the whole. But that section does not apply to this case, for the Company do not want any part of this property. The 46th section uses the word "property," and seems to use it in a collective sense; it says, if the Company themselves wish for any part, they must "take the whole of such property." But the 47th section, which is the section enabling the owner of premises within 50 feet of the railway to call upon the Company to take such premises, leaves the word "property" behind altogether; and says, if the owner of "any house, manufactory, ground or building, which shall be situate within 50 feet of the railway," shall himself desire it, he may call upon the Company by notice "to treat for the purchase of his interest in the houses, manufactories, ground and buildings mentioned in such notice." Nothing is said in this section about the Company buying the whole, if part is within the 50 feet. The Company are willing to purchase the dwelling-house, yard and garden, which are within the 50 feet. That is all they can be required to purchase under the 47th section, and this rule must be discharged.

PATTESON J.—By the 46th section, if the Company want part of a property, they must take the whole. The Company want no part of this property. The case therefore is not within the 46th section, but the 47th. The 47th section relates to all persons whatsoever, and is to be construed as if the 46th section were out of the act. The

(a) 6 M. & W. 699.

(b) 1 G. & D. 589.

(c) 6 N. & M. 340.

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45th section also relates to all persons whatsoever, and there does seem to be some connection between that section and the 47th. The 45th section says, that "if any party" shall be applied to by the Company to sell "any part of any house, warehouse, building or manufactory," he shall not be compelled to sell "part only or less than the whole of such house, warehouse, building or manufactory." Even under that section, if the Company had themselves wished for any part of the dwelling-house, they would not be obliged to take more than the whole of that very house. A fortiori, under the 47th section, the Company cannot be obliged to take the whole of this property, when they want no part of it whatever.

WILLIAMS J.—If the Company were willing to take part only of the house or of the garden, it would be a different question. It is assumed that because all this property has been taken under one lease, the word "manufactory" includes the whole of it, as one *entire* thing. But it does not appear that the residue of the premises will be at all interfered with by the Company taking the dwelling-house and garden from them.

WIGHTMAN J.—The consequence of making this rule absolute would be to give the same effect to the 47th as to the 46th section.

*D.*

Rule discharged.

Monday,  
 April 18th.

ADAMS v. PALK.

Where in  
 assumpsit by  
 payee against  
 drawer of a bill  
 of exchange

the defendant pleaded payment into Court of the amount of the bill against the further maintenance of the action, the rule of Trinity Term, 1838, applies to exclude evidence that the bill had in fact been paid before action, for the purposes of inducing the jury to give no interest, by way of damages, from the date of such payment.

**ASSUMPSIT.** First count on a bill of exchange drawn by the defendant, the 2nd March, 1840, for 40*l.*, payable to the plaintiff thirty days after date. Counts for horses sold,

for hire of horses, for money had and received, and on an account stated.

Pleas: As to all the declaration, except the first count, and except also the sum of 1s., parcel of the monies in the residue of the declaration mentioned, non assumpsit. 2, The Statute of Limitations. 3, Payment. 4, Set-off.

5, As to the excepted part of the declaration, payment into court of 41*l.* 18s., and that the plaintiff had sustained no damages ultra. Verification.

Replication, traversing the four first pleas, and issues thereon.

Replication to the fifth plea, damages ultra, and issue thereon.

The cause was tried on the 4th April, 1842, before Gurney B., at the Surrey assizes. On the 24th March, 1842, the defendant obtained a judge's order to pay into court an additional sum of 40*s.*, the sum already paid in being insufficient to cover the plaintiff's whole claim for interest on the bill. The sum of 40*s.* was accordingly paid in on the 30th March; but at the time of the trial the 5th plea had not been amended. On the part of the defendant, evidence that the bill in fact had been paid in June, 1840, was offered for the purpose of shewing that the plaintiff was not entitled to recover interest since the date of such payment. The learned judge thought this evidence inadmissible, as there was no plea of payment on the record, but received the evidence in order to take the opinion of the jury whether the bill had been so paid. The jury found that the bill had been paid in June, 1840. The jury, under the direction of the learned judge, found a verdict for the defendant on the 1st and 2nd issues; for the plaintiff on the 3rd and 4th, and also on the 5th, damages 40*s.* on that issue, subject to a motion to enter the verdict for the defendant on that issue if the Court should be of opinion that the evidence in question was admissible.

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*Peacock* now moved accordingly. The rule (a) of Trinity term, 1838, "that payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar," applies merely where the principal sum sought to be recovered in assumpsit is, technically speaking, in the nature of damages, and not to such accessorial damages as are claimed over and above the principal sum for its undue detention. The interest on this bill of exchange was claimed as damages in the latter sense. The jury may in such cases exercise their discretion on all the circumstances, whether to give or to withhold such damages: *Dent v. Dunn* (b), *Du Belloir v. Lord Waterpark* (c): and the defendant had a right to give in evidence any circumstances which would induce the jury to withhold such damages in the present case. He had a right, therefore, for this purpose to shew that the bill had been paid, although he had not pleaded the payment.

Lord DENMAN C. J.—The nonpayment of the bill was admitted on the record, and the plaintiff could not anticipate that you would attempt to prove the payment: the issues would put him off his guard. You may move for a new trial on affidavit of the facts.

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule refused.

(a) 3 N. & P. 381.  
(b) 3 Campb. 296.

(c) 1 D. & R. 16.



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*Tuesday,*  
*April 26th.*

## KING v. SHARE.

**DEBT** against an overseer of the parish of St. Margaret, in the borough of King's Lynn, for not making out and signing an alphabetical list of burgesses in the said parish, entitled to be on the burgess roll for the year 1838.

An omission by an overseer, whether wilful or not, to sign the burgess list, required by the stat. 5 & 6 Will. 4, c. 76, s. 15, subjects each overseer so neglecting to the penalty imposed by section 48.

The plaintiff obtained a verdict, subject to a case, which stated the same facts as in *King v. Burrell (a)*, except that there the action was brought against an overseer who had not signed his ward list; but in this case the defendant had signed his own ward list. No ward list for the entire parish had been made out at all.

Where the parish consists of several wards, a signature by one overseer of a list of the persons entitled to be on the burgess list, for his own ward only, is not a sufficient compliance with the statute to exempt him from the penalty for not signing the list for the parish.

The questions raised were, first, whether, under the circumstances, the defendant was liable to the penalty under the stat. 5 & 6 Will. 4, c. 76, s. 48; and, secondly, whether separate actions were maintainable against each overseer for the default of making out the parochial lists, or whether only one action would lie for the default of all of them.

The case was argued by *O'Malley (b)* for the plaintiff, and *Biggs Andrews* for the defendant.

*Cur. adv. vult.*

Lord DENMAN C.J. delivered the judgment of the Court.—This was an action against the defendant, as one of the overseers of the poor of the parish of St. Margaret, in King's Lynn, in the county of Norfolk, to recover a penalty of 50*l.* under the 48th sect. of the 5 & 6 Will. 4, c. 76, for having neglected to make out and sign a list of persons entitled to be enrolled in the burgess roll, pursuant to the provisions of the act.

It is by the 15th sect. of the act required in terms that a list of all persons who shall be entitled to be enrolled in the burgess roll of the year, in respect of property within

(a) 4 P. & D. 207.

(b) In Mich. term last (Nov. 16),

before Lord Denman C. J., Williams, Coleridge and Wightman Js.



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the parish, shall be made out and signed by the overseers of the parish.

In the present case no such list has been made out. Separate lists have indeed been made out for each ward, eight of which have been signed respectively by the overseer acting for each ward, and one has not been signed at all.

Neither the defendant therefore, nor any other of the overseers, has signed any list, as required by the statute, of the persons entitled to be on the burgess roll in respect of property within the parish of St. Margaret.

The present case has in effect been already decided in that of *King v. Burrell* (a), and in principle and almost in circumstances is the same. Here the defendant did sign a list of the persons within his ward who were entitled, and there the defendant did not, although he delivered one; but in neither case did the defendant sign any lists of the persons entitled within the parish, as required by the statute. The individual case may be one of hardship; but it arises from pursuing a mode of making out and signing the lists not warranted by the terms of the act.

It is said that only one penalty can be incurred by all the overseers; but we are of opinion that by the express words of the statute, as well as the nature of the offence, separate penalties are incurred by each.

The words of the 48th sect. of the statute are, that "if any overseer of any parish shall neglect to make out, sign and deliver such lists as aforesaid, *every* such overseer for every such offence shall forfeit and pay 50*l*."

We are therefore of opinion that the verdict ought to be entered for the plaintiff for the penalty of 50*l*.

G.

Judgment for the plaintiff.

(a) 4 P. &amp; D. 207.



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## FOUNTAIN v. BOODLE and Wife.

*Tuesday,  
April 26th.*

CASE for a libel. Plea: not guilty. At the trial before Lord Denman C. J., at Westminster, at the sittings after last Hilary term, it appeared in evidence that the plaintiff had been employed in the service of the defendants as daily governess; that she continued in their service fourteen months; at the expiration of which period they gave her notice to leave, which she accordingly did. The defendant Mrs. Boodle was afterwards applied to by a lady, who was desirous of engaging the plaintiff, for her character, when she wrote the following letter, which was the libel complained of.

"7, Lansdown Place, Brighton, 17th Sept. 1841.

"Madam,—In answer to your inquiries respecting Miss Fountain, I beg to say she had to instruct five of my children, from three to nine years old; it is about a twelve-month since I employed her. She taught them as daily governess for fourteen months, and engaged herself to teach every thing but music, which she knew nothing of, and I parted with her on account of her incompetency, and not being lady-like nor good tempered. When I engaged her she recommended a young friend of hers to teach the music, whom I was much pleased with, and I discontinued her services when I took another governess.

(Signed) F. Boodle.

"P.S. May I trouble you to tell her that, this being the third time I have been referred to, I beg to decline any more applications."

In consequence of this letter the plaintiff lost her engagement. Evidence (a) was given to shew that the plaintiff was

(a) See also the statement of the evidence in the judgment, *post*, 459.

the letter being an answer to an inquiry into the character of a servant *prima facie* it was privileged, but that the letter itself and the facts proved were some evidence for them, that the writer was actuated by express malice, to rebut any inference of which the defendant might have given evidence to shew that the statement itself of the character was a true one, or that she believed or had reason to believe it to be a true one:—*Held*, that this direction was right.

In answer to an inquiry as to the character of a governess, the defendant wrote a letter in which she said, "I parted with her on account of her incompetency, and not being lady-like nor good tempered."

To this letter there was the following postscript: "May I trouble you to tell her that, this being the third time I have been referred to, I beg to decline any further applications." In an action by the governess against the defendant for writing this letter, she gave evidence tending to negative the statement in it of her qualifications, and she proved that previously the writer had recommended her as a governess. The judge directed the jury that

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competent to discharge the duties of a governess, and that she was lady-like in her manners and good tempered. It also appeared that the female defendant had recommended her as governess during the time plaintiff was in her employment. It was contended on the part of the plaintiff at the trial, that the letter could not be considered as a privileged communication, and that the letter itself contained evidence of malice sufficient to entitle her to recover. On the other hand it was urged, that the defendant had done no more than was necessary, in order to reply to the application made for plaintiff's character; that the letter was not voluntary, and that it was clearly privileged. Lord Denman C. J. left it to the jury to say, whether the defendant Mrs. Boodle was actuated by malice in sending the letter complained of, telling the jury that, if she gave a character untrue within her knowledge, this would be evidence of malice, and that it was open to her to give evidence of the truth of the statement, or of her reason to think it true, in order to rebut the inference afforded by that evidence. The jury found a verdict for the plaintiff.

*Kelly* moved for a new trial (a), on the ground that there was no evidence of malice to go to the jury, and that the verdict was against the evidence. The letter complained of was sent in answer to an application to defendant for plaintiff's character, and contained nothing more than an answer to the questions; it therefore cannot of itself be evidence of malice: *Child v. Affleck* (b), *Pattison v. Jones* (c), *Rogers v. Clifton* (d). [Lord Denman C. J. A statement of an untruth, to the prejudice of another, is evidence of malice.] Here there is no evidence of its being untrue to the knowledge of the defendant. It is not sufficient to raise an inference of malice to shew that the character is false, it must be shewn to be false within the knowledge

(a) April 19, before Lord Denman C. J., *Patteson, Williams and Wightman* Js.

(b) 9 B. & C. 403; S. C. 4 M.

& R. 338.

(c) 8 B. & C. 578; S. C. 3 M. & R. 101.

(d) 3 B. & P. 587.

of the writer. [Lord Denman C. J. *Child v. Affleck* (a) shews that falsehood is evidence of malice.] Evidence was given to shew that other persons considered plaintiff not to be incompetent and ill-natured, but that is mere matter of opinion, and cannot be evidence from which a jury can infer malice. [Lord Denman C. J. What do you say to the postscript, "Tell her not to apply to me again?"] There is no case to be found where an answer to an application for a character has been held to be libellous; in all the cases there has been a stepping out of the way to injure the party. It has always been held that *primâ facie* a character given by a master to a servant is privileged, and it is incumbent on the plaintiff to prove actual malice; here debors the letter itself, there was no evidence of malice. There was also evidence given which would negative malice, as the plaintiff was recommended by the defendant to a lady as a governess for her children. [Lord Denman C. J. In an action for a malicious prosecution, would not total want of probable cause be evidence of malice? I took the judgment of *Bayley* and *Littledale* J. in *Child v. Affleck* (a), as my guide in the direction I gave to the jury as to falsehood being evidence of malice. I cannot disguise from myself that the rule attempted to be drawn from some of the cases renders every servant quite dependent on the caprice of a harsh or unjust master. I told the jury that it was certainly matter of opinion, whether the plaintiff was incompetent and ill-mannered, and that they must be satisfied that the letter was not written with a *bonâ fide* intention of giving a character alone, before they could find a verdict for plaintiff; and I am very glad to find that my brothers are of opinion that I was right in so leaving it to the jury. *Patteson* J. I feel no doubt whatever, that, if the case ought to have gone to the jury at all, my lord left it properly to them. *Primâ facie* undoubtedly a character given by a master is privileged, but it is not so if given with a malicious intention. It is true my lord told the jury that it lay on the defendant to prove the truth of the assertions, yet

(a) 9 B. &amp; C. 403; S. C. 4 M. &amp; R. 338.

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he did not mean that she should prove it as a justification, but to shew to the jury that in making this statement she acted *bonâ fide*, and not with the malicious intention sought to be inferred from the facts given in evidence by the plaintiff. Therefore the question in this case is, whether there was any evidence to go to the jury of malice on the part of the defendant Mrs. *Boodle*.]

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—The Court has already refused a rule on the ground of misdirection, and we are desirous in so important a case of repeating our reason for doing so. It is because the law was laid down in exact conformity with the existing authorities on the subject.

A character *bonâ fide* given of a servant of any description is a privileged communication, and in giving it *bona fides* is to be presumed.

Even though the statement should be untrue in fact the master will be held justified by the occasion in making that statement, unless it can be shewn to have proceeded from a malicious mind. Malice may be established by various proofs; one may be that the statement is false to the knowledge of the party making it. Up to this point the summing up was not complained of, but another part of it was brought before the Court as objectionable.

The misstatement here imputed was, that defendant had discharged plaintiff by reason of her faults enumerated in the letter. This could be *known* to nobody besides defendant, but she might have shewn the probability of that being the real motive from remonstrances made by her during plaintiff's attendance or complaints on its being terminated. I told the jury to the effect that, if the plaintiff brought any evidence of wilful untruth, some evidence of the contrary might be reasonably expected, where the nature of the case allowed it.

This is a general proposition, applicable to every form of action and to evidence of all kinds.

The remark is of constant occurrence—"Some proof has been laid before you; you are to consider whether, if unanswered, it is sufficient, and whether the party affected by it might have repelled it, if erroneous, by contrary evidence, now none such is adduced."

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The Court wished for time to consider whether there was, in the present case, any evidence of wilful falsehood in the character given. In support of this imputation, plaintiff urged that she had served Mrs. Boodle above a year in the capacity of governess; that no complaint was made on any single occasion as to her competency, temper or manners, and that she had been twice recommended, by defendant during that year to other persons, to a situation similar to that which she then filled. She charged no particular fact, for that might have come to her knowledge after she had recommended her, and that knowledge might have been confined to herself, so as to preclude her from calling any witnesses to it. But the statement here was, that she acted on her own opinion respecting plaintiff's capacity and qualities, and of these she possessed the same means of forming an opinion when she introduced her into other families as at any later period.

The amount of deduction from these means of observation, on account of illness, was submitted to the jury among the circumstances of the case. But the question was not on the justice of defendant's opinion, it was on the truth of her statement that she acted on that opinion in dismissing her. "I parted with her for her incompetency, bad temper and unlady-like manners." Now she parted with her after a few days' absence, caused by plaintiff's illness, which perhaps had not been duly notified beforehand, and there was something very harsh in the manner of the dismissal. There was a sentence also in the letter containing the character, which requested the lady addressed to desire plaintiff to make no more applications to defendant, as she had already answered two. Here the idea was conveyed that she had already, since parting with plaintiff, spoken of her

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twice in the same disparaging strain, when asked for her opinion of plaintiff, whereas the only two occasions on which she had given her any character were during the period of her attendance, and on both of these occasions she had commended her and procured employment for her.

Here was undoubtedly some evidence of the injurious character being dictated by some indirect motive. Of course then it must be laid before the jury. But the learned counsel contends that it is so extremely slight that, though uncontradicted in any particular, the jury ought to have found a verdict against its sufficiency. He observes that the privilege is but illusory, if circumstances so minute can be raised into proof of malice. Much more illusory would it be to hold that there was evidence on which the jury must decide, but that they must decide one way, or the verdict cannot stand. We cannot place ourselves in their stead and impose our own judgment upon them. They have advantages for attaining the truth, which we do not possess, and are the proper tribunal for that purpose. They were bound to decide upon the weight of the evidence laid before them, and we cannot say that they have done wrong in the present instance.

G.

Rule refused.

*Tuesday,*  
*April 26th.*

FULLER *v.* WILSON.

In an action on the case for a fraudulent representation of the value of a house, on a sale of the

**CASE.** The declaration recited the possession by the defendant of a certain unexpired term of years of premises in London, under a demise by deed. It then recited an agreement between the plaintiff and the defendant for the lease of it by the defendant to the plaintiff, it appeared that the defendant employed her attorney to put it in a course of being sold by auction. He described it to the plaintiff as being let for 100*l.* a year, clear of all rates and taxes, while in truth the defendant was to pay all rates and taxes. The attorney made this statement bona fide believing it to be true, but the statement was not authorised by the defendant, nor had the defendant herself made any representation on the subject.

On this representation the plaintiff bought the house, paying a larger price for it than he would have done, if he had known the fact that the defendant paid the rates and taxes:—*Held*, that the plaintiff was entitled to recover the difference of value from the defendant.

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purchase by the former of the latter of the term, and the assignment by deed of the unexpired term by the defendant to the plaintiff in pursuance of the agreement, in consideration of the sum of 600*l*. The declaration then proceeded as follows:—That before and at the several times of the making of such contract and agreement for the purchase of the said messuage or tenement and premises as aforesaid, and of the making and executing of the said last-mentioned indenture of assignment, and of the payment of the said purchase money or sum of 600*l*. as aforesaid, the said messuage or tenement and premises so demised by the said first-mentioned indenture as aforesaid, had been and were let to, and in the possession and occupation of one *William Mills* as tenant thereof to the said defendant, that is to say, as tenant from year to year, so long as the defendant and the said *W. Mills* should respectively please, at and under a certain rent therefore paid and to be paid by the said *W. Mills* to the said defendant, to wit, amounting to the yearly sum of one hundred pounds, deducting thereout and therefrom certain taxes and rates charged, rated and assessed, and chargeable and rateable yearly and in each year upon the said messuage or tenement and premises so purchased by the plaintiff as aforesaid, and upon the said *W. Mills*, as such occupier of the same in respect thereof, and amounting yearly and each year to divers large sums of money, to wit, amounting together to 16*l*. 9*s*., and which taxes and rates the said *W. Mills* was to be at liberty to deduct and retain from and out of the said yearly rent of 100*l*., and the said messuage or tenement and premises so purchased by the plaintiff did not at the several times aforesaid, or either of them, yield a net improved rent of 62*l*. 10*s*. for a year, subject to the insurance hereinbefore mentioned. All which premises aforesaid the said defendant before and at the several times aforesaid respectively well knew. That the same premises were not at those times, or either of them, known to the said plaintiff, nor was he the said plaintiff at those times, or either of them, acquainted there-



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with, as the said defendant at the several times aforesaid respectively also well knew. Yet the plaintiff, in fact saith, that the said defendant, well knowing the premises, but fraudulently, wrongfully and improperly contriving and intending to deceive, injure and defraud the said plaintiff, before and at the several times of the making and entering into the said contract and agreement for the purchase of the said messuage or tenement and premises so assigned to the plaintiff as aforesaid, and of the making and executing of the said assignment, and of the payment of the said purchase money by the said plaintiff as aforesaid, and with the view and intention of obtaining a larger price or sum of money for the purchase of the same messuage or tenement and premises than the plaintiff would otherwise have given for the same, falsely, fraudulently, and improperly deceived the said plaintiff, and then falsely, fraudulently and deceitfully represented and pretended to the said plaintiff, and caused and procured the said plaintiff to suppose and believe, and the said plaintiff did then suppose and believe, that the said messuage or tenement and premises so in the occupation of the said *W. Mills* aforesaid were then let to and held by him as such tenant as aforesaid, at a rent amounting to and after the rate of 100*l.* for a year, clear of any such taxes and rates as aforesaid and every part thereof, and that, subject to the said insurance heretofore mentioned and referred to, the said messuage or tenement and premises then yielded a net improved rent of 62*l.* 10*s.* a year, and then wrongfully, fraudulently and deceitfully wholly concealed from the said plaintiff that the said rent payable by the said *W. Mills* as aforesaid was subject to the deduction for the said taxes and rates as hereinbefore mentioned, or any part thereof. And the said plaintiff further saith, that he the said plaintiff made and entered into the said contract and agreement for purchase of the said messuage or tenement and premises as aforesaid at and for the price aforesaid, and was induced so to make and enter into the same, and also accepted the said assignment so made to him as aforesaid, and paid the

said purchase monies in manner aforesaid, and was induced so to do, fully confiding in the representations and pretences and conduct of the said defendant in and about the premises in that behalf as aforesaid, and in the full faith and belief and confidence that the said message or tenement and premises so purchased by him the said plaintiff as aforesaid, were at the several times aforesaid let to and held by the said *W. Mills* as such tenant as aforesaid at a rent amounting to and at and after the rate of 100*l.* for a year, clear of any such taxes and rates which he was so at liberty to deduct as aforesaid and every part thereof, and that subject as aforesaid the said message or tenement and premises so purchased by the said plaintiff as aforesaid at the several times aforesaid yielded the said net improved rent of 62*l.* 10*s.* altogether as aforesaid. All which the defendant at the several times aforesaid and of the committing of the grievance in this count mentioned respectively well knew. And the plaintiff further saith, that the said defendant by means of the premises at the several times aforesaid, falsely and fraudulently deceived the said plaintiff on the said sale, and in manner aforesaid, and thereby induced and caused and procured the plaintiff to purchase the said message or tenement and premises, and to pay to the defendant a much larger sum of money, to wit, by the sum of 300*l.*, than he would otherwise have paid to the said defendant for the purchase of the said message or tenement and premises aforesaid, and the same message or tenement and premises have thereby become and are of much less value to the said plaintiff than they would otherwise have been, and the plaintiff hath lost and been deprived of all the profits, benefits and advantages, amounting to a large sum of money, to wit, the sum of 300*l.*, which he otherwise would have made, derived and acquired from the said purchase of the said message or tenement and premises, and hath been put to great trouble and expense, to wit, to the amount of 50*l.* in and about such purchase, and the completion of the

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same, which but for the premises aforesaid he would not have incurred or sustained, to the damage, &c. Plea, not guilty.

The issue was tried before Lord *Denman* C. J. at Guildhall at the sittings after Michaelmas term. It appeared that the defendant had become possessed of the premises in question as administratrix of her husband, that shortly before the contract of sale by her to the plaintiff, who was an auctioneer, he had been employed by her to sell the premises by auction. Printed particulars of the premises were prepared for the purpose of that sale, under the direction and with the approbation of Mr. *Wadeson*, who was her attorney and agent for the disposal of the premises. In those particulars the premises were described as let to Mr. *Mills* at the rent of 100*l.* per annum, clear of rates and taxes. That was not the fact; in truth the rates and taxes were always paid by defendant, and it was one of the terms of the demise, that they should be so paid by her. The statements of the particulars of the premises did not appear to have been made with the knowledge of the defendant; and Mr. *Wadeson*, by whose direction and approbation it was made, believed it to be correct. The premises were put up for sale by auction and bought in. The plaintiff shortly afterwards agreed with Mr. *Wadeson* to become the purchaser for the sum of 600*l.* The difference between the supposed and true rent made the term in the premises worth only 470*l.* instead of 600*l.* It was objected on the part of the defendant that there was no misrepresentation at all by her personally, that there was no *mala fides* on her part, and that she was not liable for a misrepresentation made by Mr. *Wadeson*, even if he wilfully made it, which he did not, as he made the representation *bonâ fide*, believing it to be true. Lord *Denman* C. J. on the authority of *Cornfoot v. Fowke* (a), nonsuited the plaintiff, giving him, however, leave to move to enter a verdict for 130*l.* Leave was also

(a) 6 M. & W. 358.

reserved to him to turn the facts into a special verdict (a). A rule was obtained to enter a verdict for the plaintiff, against which

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(a) The following is the special verdict as afterwards settled. A writ of error has been brought upon it.

It found, "That by an indenture of lease duly executed, bearing date the 25th day of December, A.D. 1837, the Master, Wardens, Freemen and Commonalty of the Mystery of Vintners of the City of London, demised to the defendant the messuage and premises situate and being No. 5, Foster Lane, in the city of London, To have and to hold the same to her and her executors, administrators and assigns, for the period of fifty-three years from the said 25th day of December, subject to the rent of 37*l.* 10*s.* per annum, and the performance of certain covenants in the same indenture contained: And further, that at Christmas, A.D. 1835, the defendant demised the said messuage and premises comprised in the said lease to one *William Mills*, to hold as tenant from year to year on the same terms upon which one *Burrow* had before and until that time held them. The terms upon which *Burrow* held them were 100*l.* a year rent, the rates and taxes, amounting to 16*l.* 9*s.* per annum, being paid by the defendant, who lived in the parish in which the said messuage and premises were situate; that the said *William Mills* two or three times paid rent to the defendant, and sometimes to her son for her. That the plaintiff is, and in the month of May, 1837, was, an auctioneer, and that in the said month of May, 1837, the defendant desired one Mr. *Wadeson*, who then was and is an attorney, and whom the defendant employed as her attorney in the matter of sale of the said messuage and premises, to instruct the plaintiff to prepare particulars and conditions of sale for the sale thereof by auction. That the defendant referred the said Mr. *Wadeson* for information to one Mr. *Bass*, who had a lien upon the said premises, and who told the said Mr. *Wadeson* that the rent of the said messuage and premises was a 100*l.* a year; that the said Mr. *Wadeson* asked no questions about the tenant paying rates and taxes, assuming that the tenant did so, such being always the practice in London, that the defendant did not in any way further interfere in the matter: That the said Mr. *Wadeson* gave the following instructions in writing to the plaintiff as to the said premises, "No. 3 (meaning the said messuage and premises, No. 3, Foster Lane), is in the occupation of a yearly tenant, Mr. *Mills*, at 100*l.* a year." That the said Mr. *Wadeson* did not know that the defendant paid the rates and taxes. That the said Mr. *Wadeson* never described the said premises to the plaintiff otherwise than as aforesaid, and never described them as clear of taxes, or gave him any authority to put any statement to that effect into the particulars. That the plaintiff prepared a particular of the said messuage and premises for sale thereof by auction, which particular was

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Sir *F. Pollock* A. G. and *Martin* shewed cause (a). It is said that this case is identical with that of *Cornfoot* v.

as follows:—"No. 3, Foster Lane. Let to Mr. *Mills*, as tenant from year to year, clear of taxes and rates, at per annum . £100 0  
 at the rent (besides an insurance of 800*l.*) per annum 37 10

Net improved rent £62 10

That the said particular was seen by the said Mr. *Wadeson*, who did not correct it, because he thought it true. That the said Mr. *Wadeson* considered it the plaintiff's duty, when he was employed to make out the particulars, to go and survey the premises, and inquire of the outgoings. That the said messuage and premises were in May, 1837, offered for sale by auction, and were then bought in, but were put up again for sale by auction in November, A.D. 1837, when the sum of 600*l.* was offered for them, and the plaintiff bid 610*l.* to raise the biddings, and they were bought in at 610*l.* And as the plaintiff had prevented the sale at 600*l.*, he considered himself bound to take them himself at that price, and did so. That an assignment from the defendant to the plaintiff of the said messuage and premises was prepared by the attorney for the Vintners' Company; and the plaintiff paid 600*l.* to the defendant for the purchase of the said messuage and premises. That the said assignment was a certain indenture bearing date the 16th day of February, 1838, between the said defendant of the one part and the said plaintiff of the other part, and duly signed, sealed and delivered by the defendant. The assignment is indorsed upon the said indenture, and is in the following words, This indenture, made the 11th day of July, A.D. 1838, between the within named *E. Wilson* of the one part, and *Thomas Fuller*, of Billiter Street, in the city of London, auctioneer, of the other part. Whereas the said *T. Fuller* hath contracted with the said *E. Wilson* for the absolute purchase from her of the leasehold messuage or tenement and premises within described, for the remainder of the said term of fifty-three years, granted by the within-written indenture of lease, for the price or sum of 600*l.* Now this indenture witnesseth, that in pursuance and performance of such contract and agreement, and for and in consideration of the sum of 600*l.* of lawful money of Great Britain, to the said *E. Wilson* in hand well and truly paid by the said *T. Fuller* at or before the sealing and delivery of these presents, the receipt of which said sum of 600*l.* the said *E. Wilson* doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, relieve, and discharge the said *T. Fuller*, his heirs, executors and administrators, for ever by these presents, she the said *E. Wilson*, (by and with the license and

(a) On Wednesday, January C. J., *Patteson*, *Coleridge* and 12th, 1842, before Lord *Denman* *Wightman* Js.

*Fowke(a)*, if so, the plaintiff was properly nonsuited, as the authority of that case cannot be successfully impeached.

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consent of the Master and Wardens of the within named mystery of Vintners): Hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over, unto the said *T. Fuller*, his executors, administrators and assigns, all and singular the messuage or tenement, and all and singular other the premises mentioned and comprised in and demised by the within written indenture of lease, with their and every of their rights, members and appurtenants. And all the estate, right, title, interest term of years yet to come and unexpired, property, profit, claim and demand whatsoever, legal and equitable, of her the said *E. Wilson*, of, into, and out of the said premises, and every part thereof; Together with the within-written indenture of lease, and all benefits and advantages thereof, To have and to hold the said messuage or tenement, and all and singular other the premises hereinbefore assigned, or intended so to be, with their and every of their appurtenants, unto the said *T. Fuller*, his executors, administrators and assigns, henceforth for and during all the rest, residue, and remainder now to come and unexpired of the said term of fifty-three years, granted by the within-written indenture of lease, subject nevertheless to the payment of the rent thereby reserved, and to the performance of all and every the covenants and agreements therein contained, which on the lessee's or tenant's part are or ought to be paid, performed and kept, for or in respect of the said premises. And the said *E. Wilson* doth for herself, her heirs, executors and administrators, covenant, promise and agree with and to the said *T. Fuller*, his executors, administrators and assigns, by these presents in manner following, that is to say, that for and notwithstanding any act, deed, matter or thing whatsoever by the said *E. Wilson*, or any person or persons lawfully or equitably claiming under her at any time or times heretofore made, done or committed to the contrary, the within-written indenture of lease now at the time of sealing and delivering these presents is a good, valid and subsisting lease for all the residue of the said term of fifty-three years, and in nowise merged, forfeited, surrendered, assigned, determined or become void or voidable, or otherwise prejudicially affected or incumbered. That from the time of the aforesaid demise of the said messuage and premises by the said defendant to the said *William Mills*, and until the time of the aforesaid assignment of the same to the said plaintiff, the said *William Mills* continued and was yearly tenant of the said messuage and premises, at the said yearly rent of 100*l.*, the defendant paying the said rates and taxes pursuant to her said agreement in that behalf, and that at the time the said messuage and premises were sold and assigned as aforesaid to the said plaintiff, the same were

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That case, however, goes farther than this. There it was held that the defendant was liable to an action for damages for the nonperformance by him of a contract which he had been induced to enter into by the misrepresentation of the agent of the plaintiff, whom the plaintiff had employed as such agent, to negotiate the contract. Here the agent falls into an error, and, though the plaintiff may have been misled by it, the defendant was not responsible for it. It was the duty of the plaintiff to ascertain that the description was correct before he completed the purchase; *Pickering v. Dowson*(a). The representation was neither false nor fraudulent, and there was no warranty. It must be said, on the other side, if there be any misrepresentation, though erroneously and not wilfully made, a court of law must infer fraud. It is incontestible that here there was no moral fraud, or fraud in fact. In all the cases in the books, there was either fraud in fact, or that wilful and knowing assertion of an untruth, from which it must be inferred. Without such fraud there is no cause of action; *Pasley v. Freeman*(b), *Haycraft v. Creasy*(c). A misrepresentation, known to be so, and calculated to induce another to act upon it, is fraudulent; *Polhill v. Walter*(d), *Foster v. Charles*(e). Here, if the agent, though he believed his

still occupied by the said *William Mills*, by virtue of the said demise and upon the terms aforesaid, that neither the plaintiff nor the said *Mr. Wadeson*, until after the said assignment of the said messuage and premises to the plaintiff, and the payment by him to the defendant of the said sum of 600*l.*, knew that it had ever been agreed to between the said defendant and the said *William Mills* that the said rates and taxes were to be paid by the said defendant, or that the said *William Mills* was entitled to have the same paid by the said defendant, and that, at the time of the said assignment and of the payment of the said sum of 600*l.* as aforesaid, the plaintiff believed that the said messuage and premises were let to the said *William Mills* for 100*l.* a year, clear of rates and taxes. That in May the reserved bidding was 900*l.*, and in November 600*l.*, but whether or not, &c.

(a) 4 Taunt. 779.

(b) 3 T. R. 51.

(c) 2 East, 92.

(d) 3 B. & Ad. 114.

(e) 6 Bing. 402; 7 Bing. 105;  
 S. C. 4 M. & P. 61, 741.

statement to be true, had made it with the knowledge of the principal, he knowing it to be untrue, that might have amounted to a legal fraud in the principal; *Pilmore v. Hood*(a). In *Freeman v. Baker*(b), the other judges concurred with *Parke J.* in explaining the cases on this subject, the utmost extent of which is, "that if a person states what he knows to be untrue, and induces another to act upon it to his prejudice, a fraud in law is committed."

Lord *Abinger C. B.*, in *Cornfoot v. Fowke* (c), dissented from the majority of the Court, but the judgment of that learned judge does not support such a right of action as is here contended for. Distinguishing such a case as this from that before him, "It appears to me," said his lordship, "that nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of his agent," but his lordship treats it as a very doubtful question, whether an action of deceit could be maintained against a principal for a false statement by an agent, who in making it exceeds his authority. The position of the judgment of *Parke B.* agrees with the authority of *Goram v. Sweeting*(d). It is not enough that a representation is untrue, it must be proved to have been fraudulently made. In the judgment of Lord *Abinger C. B.* no difference appears to be made between a warranty and a representation.

*Thesiger* and *Francillon* in support of the rule. There was a concealment and a false representation, by which the plaintiff was induced to enter into this contract, and give a larger price than he otherwise would have done. *Wadeson* was an agent to state what was for sale, and supposing him to have bonâ fide stated the amount of rent he believed to be paid for the premises, then the defendant was guilty

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(a) 5 Bing. N. S. 97; S. C. 8 & M. 446.  
Scott, 180. (c) 6 M. & W. 358.  
(b) 5 B. & Ad. 805; S. C. 2 N. (d) 2 Saund. 200 c, note.



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of fraud in law, in not putting the agent in possession of this fact, viz. the payment of rates by her, which made the statement of the gross amount of rent an untrue statement of the real annual value of the premises. The case is precisely the same as if the defendant had herself made the statement of the rent; but, if not, the defendant is liable for the material misrepresentation which has induced the plaintiff to give a larger sum for the premises than he would have done, and which increased price defendant has received. The authorities beginning with *Pasley v. Freeman* (a) are distinguished by Lord Abinger C. B. from such cases as this, in which the defendant seeks to derive an advantage from the false statement. "The plaintiffs in those cases sought to charge a party with damages, for stating that which he believed to be true, though he did not know it to be so, in answer to inquiries made by the plaintiff respecting the credit of a third person. There the defendant had no end to gain, no interest in the event, no motive to deceive; he was not one of the dramatis personæ in the construction of any contract." There is no case except *Cornfoot v. Fowke* (b) that says, where there is an interest in making an untrue statement, that an action will not lie, because made with a bonâ fide belief of the truth of it. [Patteson J. There is a common case of the representation of the soundness of a horse, if it be not made with a knowledge that it is untrue, would an action lie?] In general where such representations are made, they amount to a warranty, and it is settled that they are evidence to go to a jury of a warranty, and the question does not appear to have arisen; and it is submitted that an action would lie against the vendor if he represented the horse to be sound, though it would be otherwise if he made a bonâ fide statement only that he believed the horse to be sound. This case differs from *Cornfoot v. Fowke* (b) in this, that there it might be contended that the untrue statement had not that rela-

(a) 3 T. R. 51.

(b) 6 M. &amp; W. 358.

tion to the subject-matter of the contract required by law in order to afford a right of action. What is really sold here is the reversion, to which the rent is incident. *Lysney v. Selby* (a) is a direct authority that an action is maintainable for a false representation of the amount of rent by the vendor of a house. In *Dobell v. Stevens* (b), Lord *Tenterden* C. J. cited that case as an authority that an action would lie for a fraudulent or deceitful representation, though not incorporated or repeated in the written agreement or conveyance afterwards executed by the parties. On one branch of the question this case is conclusive, that this is a representation, having such a relation to the subject-matter of the contract as to give a right of action, if made fraudulently. On the other branch of the question—whether the principal is responsible for the acts of his agent, *Mayhew v. Eames* (c), *Willis v. Bank of England* (d), *Schneider v. Heath* (e), are direct authorities for this position, that in such a case as this, the knowledge of the principal is the knowledge of the agent, and, if so, the agent made a statement which civiliter he must be considered to have made with a knowledge of its untruth, which it is not disputed is sufficient to found an action for a deceit. In *Schneider v. Heath* (e), too, Sir J. *Mansfield* C. J. held it to be evidence of fraud to make an untrue statement of a fact without the actual knowledge of its truth or untruth. The majority of the judges in *Cornfoot v. Fowke* (f) appear to have considered (g) that the principal would be liable for a false statement by an agent fraudulently made, they differing from Lord *Abinger* C. B. only on the question as to what in a civil action is evidence of fraud.

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*Cur. adv. vult.*

(a) 2 *Ld. Raym.* 1118; *S. C.* 1 *Salk.* 211; nom. *Risney v. Selby*, The question was on the record.

(b) 3 *B. & C.* 623; *S. C.* 5 *D. & R.* 490.

(c) 3 *B. & C.* 601; *S. C.* 5 *D. & R.* 484.

(d) 4 *A. & E.* 21; *S. C.* 5 *N. & M.* 478.

(e) 3 *Camp.* 506.

(f) 6 *M. & W.* 358.

(g) See per *Parke* B. remarking on the case of *Hern v. Nichols*, 1 *Salk.* 289.

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LORD DENMAN C. J. now delivered the judgment of the Court.—The facts of this case, which was tried before me at Guildhall, when divested of some unimportant particulars, stand thus. Defendant, being the owner of a house in the city, employed her attorney to put it in a course of being sold by auction. He described it to the auctioneer as being free from rates and taxes, and it was bought by plaintiff, on that representation, for 600*l*. It was in fact subject to rates and taxes amounting to above 16*l*., on a rent of 100*l*., and would have been sold for no more than 470*l*. if that representation had not been made. Plaintiff brought an action for this difference in price.

It was an action on the case for a fraudulent misrepresentation of the value of the house; but defendant had made no representation at all, and her attorney, who made it, did not know it to be false.

On these facts it was assumed at the trial that the recent case of *Cornfoot v. Fowke* (a) was directly in point, on which supposition I thought myself bound by the authority of the Court of Exchequer to direct a nonsuit, allowing plaintiff to move for a verdict. It now likewise appears to the Court, that in one point of view that case is a direct authority bearing on the present, though the facts of the two are not in all respects entirely similar. For it was there holden, by three of the learned barons, in opposition to the opinion of Lord *Abinger*, that the plea of fraud was not sustained, because plaintiff had made no representation and plaintiff's agent did not know his own representation to be false. If this be correct as to a plea of fraud, neither can the action for deceit lie under the same circumstances.

Lord *Abinger* maintained, and surely not without reason, that there was some moral fraud in the conduct of both, the principal concealing a fact which made his house utterly unfit for the purpose for which he was letting it, the agent making a statement, which of course he could not know to be true even if he believed it.

(a) 6 M. & W. 358.

We do not, however, take this ground; we adopt the other proposition of the chief baron, viz. that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it.

We think the principal and his agent are for this purpose completely identified, and that the question is not, what was passing in the mind of either, but whether the purchaser was in fact deceived by them, or either of them.

In the present case, the agent was not indeed instructed to make any representation specifically on the subject of rates and taxes, but he could not sell the house without describing it, and he described it untruly in an essential point. He said, in effect, "I sell you an annuity of 100*l.*," when he was selling an annuity of 84*l.* only. By this false statement plaintiff was induced to part with his money to defendant, who cannot be allowed to retain it. The consequence is, that the rule for setting aside the nonsuit, which proceeded on the authority of that decision, must be made absolute.

G.

Rule absolute.

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MERCHANT v. FRANKIS.

Saturday,
 April 16th.

GRAY moved for a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of Gloucestershire. The defendant had been taken in execution by a writ of ca. sa., which was afterwards set aside for irregularity. He was thereupon taken again on another ca. sa., founded directly on the same judgment. He admitted that *McCormick v. Melton* (a) was an authority that an arrest on a ca. sa., afterwards set aside for irregularity, was no satisfaction of the judgment; but he contended, that there was no precedent for the suing out a fresh writ directly on the same judgment, the usual course being to proceed by scire facias or action on the judgment.

If a writ of ca. sa. is set aside for irregularity, the plaintiff is not bound to proceed by scire facias or action on the judgment, but may at once take the defendant again on a fresh writ of ca. sa.

(a) 1 C. M. & R. 525.

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Per CURIAM (a).—There is no doubt that the plaintiff may also sue out a new writ of execution (b).

G.

Rule refused.

(a) Lord Denman C.J., Patten-  
 son, Williams and Wightman Js.

(b) See *Collins v. Beaumont*, 2  
 P. & D. 363.

The QUEEN v. The Churchwardens and Overseers of  
 VANGE.

Wednesday,  
 April 27th.

In 1621 one-third of certain lands in an island were conveyed to C., in consideration of his inclosing and defending the whole island against the overflowing of the Thames. The lands so conveyed are called "third acre lands," and the other lands the "free lands." By 32 Geo. 3, c. 31, for the more effectually embanking the island, commissioners were empowered to tax the owners and occupiers of "third acre lands" to their full amount, and, if the sum raised therefrom should be insufficient, then to tax the "free lands."

BY a poor rate, allowed in March, 1841, for the parish of Vange, in Essex, *W. Hilton* was assessed as follows:

| Name of Occupier. | Name of Owner.                              | Description of Property.   | Name or Situation of Property. | Estimated Extent.   | Gross estimated Rental. | Rateable Value.     | Rate at 1s. 6d. in the Pound. |
|-------------------|---------------------------------------------|----------------------------|--------------------------------|---------------------|-------------------------|---------------------|-------------------------------|
| William Hilton.   | The Commissioners of Sewers, Canvey Island. | House, Premises and Lands. | Canvey Island.                 | A. R. P.<br>133 1 6 | £. s. d.<br>143 0 0     | £. s. d.<br>128 0 0 | £. s. d.<br>9 6 0             |

On appeal by the said *Hilton* to the ensuing quarter sessions for the county, the sessions amended the rate by altering four of the above columns as follows:

| Name of Owner. | Estimated Extent.   | Rateable Value.   | Rate at 1s. 6d. in the Pound. |
|----------------|---------------------|-------------------|-------------------------------|
| William Hilton | A. R. P.<br>108 0 0 | £. s. d.<br>0 0 0 | £. s. d.<br>0 0 0             |

subject to the opinion of this Court on the following case:

On appeal against a poor rate, assessed upon an owner of a farm consisting of "third acre lands," the sessions granted a case, stating that the island formed part of several parishes, that the embankment tax raised from the appellant and other persons to whom "third acre lands" had passed, had for several years been equal to the rack rent or full annual value of those lands, that the appellant paid nothing for the purchase of the farm, and that the sum raised from him for the current and preceding years was 123*l.*

The case submitted to this Court the following question:—"Whether the said sum of 123*l.* ought to be deducted from the assumed gross rental, in estimating the annual or rateable value of the farm, in assessing the appellant to the poor rate?"

Held, that there was a beneficial occupation by the appellant, and that the said sum of 123*l.* ought not to be so deducted.

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The appellant was the owner and occupier of the property for which he was assessed, being a farm called "Scar House," lying in that part of the parish of Vange which is situate in Canvey Island. This island contains altogether about 4000 acres, and is situate in and forms detached parts of the parishes of Vange and eight others. A considerable portion of the lands of the island are called and known by the name of "third acre" lands, of which description the farm before mentioned entirely consists.

In the year 1621 Sir *Henry Appleton* and others, being the owners of certain lands lying in Canvey island, which lands were at every spring tide overflowed by the river Thames, by indenture dated 9th April, 1621, contracted and agreed with *Joas Cropenbergh* for the inning, inclosing and fencing of all the grounds in the island, and the same, at his own proper costs and charges, maintaining and keeping from all inundations and overflowing of the said river Thames for ever. And it was in and by the said indenture covenanted and agreed that the said *Joas Cropenbergh*, in consideration thereof and of his great pains, hazard and charge in and about the inning and fencing of the said grounds from the inundation and overflowing of the said waters, should have and enjoy to him and his heirs, in fee simple for ever, one full third part of all and singular the lands of the said parties, situate in the said island.

*Joas Cropenbergh* having inned, gained, recovered and fenced the lands of the island, the said indenture was, in Hilary term, 1622, by consent of all parties thereto, made a decree of the Court of Chancery, and the third part of all the same lands so inned was thereby decreed and established to *Joas Cropenbergh*, his heirs and assigns, for ever, upon the conditions in the said indenture mentioned.

The lands thus vested in *Joas Cropenbergh*, his heirs and assigns, were and are called the "third acre" lands, and are known by that name. And the farm before mentioned, belonging to and occupied by appellant, comprises a part thereof. Those lands which remained in Sir *H. Appleton*

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and other persons, were and are called the "free" lands; and those lands which have been since the embankment of the island recovered at different times from the sea, by different individual proprietors, are called "outsands."

By statute 32 Geo. 3, c. 31, intituled "An Act for more effectually embanking, draining, and otherwise improving the island of Canvey, in the county of Essex," (and which is declared a public act,) certain commissioners therein named, and they and their successors to be appointed as in the said act is mentioned, were thereby directed and required, from time to time and at all times thereafter, to support or build, raise, strengthen and maintain, the walls and banks, and other works of drainage, then standing and being in the island (except such as were erected and made around those parts called the "outsands"), and to make and erect such other walls and banks, sluices and tunnels, and to cut such other drains in, upon, through and over the island (except as aforesaid), as should be necessary for the more effectually protecting, preserving and draining of the island, and all such walls, banks, drains, sluices, tunnels and other works, from time to time to repair, support, maintain, work, cleause and use in such a manner as the commissioners should direct and appoint.

The act then gave the commissioners power for the above purposes, from time to time and at all times thereafter, to tax and charge the owners or occupiers of the "third acre" lands to the full annual rent or value of such lands respectively (if necessary). And the commissioners were by the act further empowered (if the monies to be raised upon the owners or occupiers of the "third acre" lands should not amount to the sums which the exigencies of the several years might require), to supply such deficiency by taxing and assessing the several other lands within the island (except the "outsands").

Since the passing of the act, the several works therein mentioned have been and are vested in the commissioners and their successors for the purposes of the act, and they

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have, in the exercise of the powers given them by the act, repaired and kept in repair the walls, embankments, and other works mentioned in the act, and have in three recent years (viz. in years 1837, 1838 and 1839), in consequence of the proceeds of the "third acre" lands being insufficient for the exigencies of those years, and in pursuance of such powers, assessed and raised certain sums of money on the "free" lands to supply such deficiency. The whole of the sums assessed and raised by the commissioners are applied generally to the repair of the whole of the works vested in the commissioners, and no sum assessed and raised upon any particular portion of land is applied to any particular portion of the works. There are no more or other "third acre" lands within the parish of Vange, than the farm before mentioned. The other land in the island, situate within Vange parish, consists of "free" land. The appellant paid nothing for the purchase of the "Scar House" farm, which he has occupied as the owner thereof, subject to the liabilities imposed on it by the above mentioned decree and act of parliament. The quantity or extent of which the "Scar House" farm was estimated in the original assessment, includes the portion occupied by that part of the sea wall or embankment vested in the commissioners, which is contiguous, and upon which the farm is abutting. And the extent at which the same farm is estimated in the rate, as amended by the sessions, is the extent of that portion which belongs to and is occupied by the appellant, exclusive of the same sea walls, embankments and other works, vested in the commissioners.

For several years since, the sums assessed and raised by the commissioners upon the "third acre" lands, for the purposes of the act, have been equal to the rack rent or full annual value of those lands, and the sum which has been assessed upon and paid by the appellant, in respect of the "Scar House" farm, has been for the current and preceding years 123*l.* per annum.

The annual outlay and expenditure in and about the



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repair and maintenance of the sea walls, embankments, and other works mentioned in the act, has been and is an expence necessary to maintain the lands within the island in a state to command any rent from a tenant, or to be capable of occupation for any purpose by the owner.

No deduction whatever is made to appellant in the rate appealed against in respect of the sea wall rate or embankment tax paid by him as aforesaid.

The question for the opinion of the Court is, whether the said sum of 123*l.* so assessed upon and paid by the appellant, ought to be deducted from the assumed "gross rental," in estimating the "annual" or "rateable" value of the same farm and lands, in assessing appellant to the poor's rate.

Sir *W. W. Follett* S. G., *Knor*, *Ryland* and *W. H. Watson*, in support of the order of sessions (*a*). The order of sessions is right, for the appellant had no beneficial occupation of the land rated. He is charged annually with a tax or rate equal to the "rack rent or full annual value." This is found in terms by the case. The whole value of the land has been taken by an act of parliament, and applied to purposes of a public nature.

2. If there is any beneficial occupation, the yearly payment of 123*l.* for the sea wall must be deducted from any rent which it may be supposed the land would let for. It is found that the payment for the sea wall is necessary to maintain the land in a state to command any rent. That payment therefore is a deduction which must be allowed under the provisions of the parochial assessment act, (6 & 7 Will. 4, c. 96, s. 1). Even before that act it was held in *Rex v. Adames* (*b*) that a sewer's rate, imposed to protect land from the sea, must be deducted from the rateable value of the land, although the tax was a landlord's tax. The

(*a*) Before Lord *Denman* C. J.,      (*b*) 4 B. & Ad. 61; S. C. 1 N.  
*Patteson*, *Williams* and *Wight-*      & M. 662.  
*man* Js.

poor rate will not suffer from the allowance of the whole sum paid for the sea wall by the owner of third acre lands, for the other lands which pay nothing to the sea wall are by their exemption enabled to contribute more to the poor rate.

It may be said the sum of 123*l.* is in the nature of rent paid by the appellant to the commissioners as landlords. But it is clear from the case that he is not tenant, but an owner in fee, who is compelled to pay the above sum as an expense necessary to the safe occupation of his property.

*Erle, James and Marsh* contra. The appellant has a beneficial occupation. The profits of his land are not applied to a public purpose, or, if the repair of the sea wall is to be deemed a public purpose, still it does not necessarily absorb the whole profits, so as to leave no beneficial occupation to the owner. For, although in the present state of things the sum paid by him for the sea wall does now absorb the whole rent, yet if at any time the rent were to rise, or the expense of the sea wall to be diminished, there would then be a surplus rent accruing to him.

It is said that the expense of the wall is an expense necessary to maintain the appellant's land in a state to command the rent. But (a) no part of this expense is either "a usual *tenant's* rate or tax" or "necessary to maintain it in a state to command rent," within the terms of the parochial assessment act. By virtue of a private agreement, subsequently confirmed by a decree of the Court of Chancery and an act of parliament, the purchaser of the third acre lands, instead of paying down the purchase money at once, bound himself to pay, year by year, the contingent expense of keeping up the sea wall for the whole island. The appellant, who derives his title from the purchaser, continues to pay this expense, not because the wall protects *his* land,

(a) Section 27 of the local act enabled tenants at rack rent, who should pay the wall "rate or tax," to reimburse themselves out of the rent to become due to their landlords.

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or *for the purpose* of maintaining it in a condition to command rent, but he pays it as a sort of rent charge or service, in consideration of which he holds the land. The case would be the same in principle if the appellant had bound himself to repair houses in London, or to do any other matter irrespective of the land in question. Suppose that by some phenomenon of nature, either by the river receding partially, or by the upheaving of the third acre lands alone, the sea wall were to become entirely unnecessary for them, but continued to be necessary for the protection of the other lands in the island, the appellant would still be bound to pay the charge. This shews that the charge has nothing to do with the exigencies of the appellant's own land; and distinguishes the present case from *Rex v. Adames (a)*, if that case can be considered law since the passing of the parochial assessment act.

Another mode, in which it may be shewn that the appellant is liable to the whole poor rate, is to consider the appellant as tenant instead of owner, and to consider the sum of 123*l.* as the rent which he pays to the sea wall as his landlord.

Even if any part of the sum of 123*l.* can be deemed paid for the protection of the appellant's land, so as to entitle him to make a deduction from its rateable value on that account, still only one third of that sum can be deducted, for the other two thirds of the sum are paid for the benefit of the free lands, which constituted two thirds of the island.

It is said the poor rate will lose nothing by allowing the third acre lands their expenses of the sea wall, because these lands, by taking upon themselves the whole of such expenses, enable the free lands to contribute the more to the poor rate. But the island is not one parish, nor does it appear that in each parish, separately, the third acre is to the free lands in the proportion of one to two. Suppose all the third acre land were in the parish of Vange, how would the improved rateability of the free lands generally

(a) 4 B. & Ad. 61; S. C. 1 N. & M. 662.

throughout the island, compensate the poor rate of that parish for the immunity of third acre land?

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Lord DENMAN C.J., in the Trinity term following (May 28th,) delivered the judgment of the Court as follows:—

This was an appeal against a poor rate for the parish of Vange, in the island of Canvey, in the county of Essex, wherein the appellant was assessed as the owner and occupier of “a house, premises and land,” in the sum of 128*l*. The sessions relieved the appellant by striking out the whole amount from the assessment, subject to the opinion of this Court upon the following case:—

In the year 1621, Sir *Henry Appleton* and others conveyed to one *J. Copenbergh* one third of their lands, situate in the said island, in fee, in consideration of his defending the same against the waters of the river Thames. The lands then so vested in *J. Copenbergh* were and are called “the third acre lands,” and the premises for which the appellant is assessed form a portion of those lands. By the statute 32 *Geo. 3*, c. 31, for more effectually embanking, &c. the said island of Canvey, certain commissioners were appointed and empowered to do such acts as to them might seem right from time to time, and necessary to protect the said island. The said commissioners were further empowered to tax the owners and occupiers of the “third acre lands,” to *the full amount* of the annual rent or value of the same; and also, if the monies raised therefrom should be insufficient, to tax other lands. The appellant paid nothing for the purchase of the said premises, but holds them as owner, subject to the liabilities aforesaid. The case then states that for several years the sums raised on the “third acre lands” for the purposes of the act have been equal to the rack rent or full annual value of those lands, and the sum assessed upon and paid by the

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appellant in respect of the said premises has been, for the current and preceding years, 123*l.* per annum.

The question thus presented for our consideration is, whether the occupation of the premises by the appellant be such as to make him liable to the rate;—a question of some difficulty undoubtedly, and which is usually expressed to be, whether the occupation be *beneficial*. The distinctions in many of the cases upon this subject are certainly very fine, and, except the subject immediately under consideration requires it, we do not know that it is useful to enter into a minute examination of them. This question of *beneficial occupation*, moreover, has been frequently before the Court; and at no distant time we had occasion to comment upon the import and meaning of the expression: see the case of *The Governors of Bristol Poor v. Wait (a)*. We will only here again observe, that “beneficial” and “profitable,” in the ordinary sense of the words, are not convertible terms; that a party holding property, in its nature rateable, is not discharged from his legal liability because he does it at a loss. Suppose a farmer to be able to prove that he was holding his farm at any assignable amount of loss, would that constitute an exemption from the poor rate? It is unnecessary, however, to put hypothetical cases: *Rex v. Parrot (b)* is the case. The unprofitable and losing occupation (expressly so found) of a coal mine, was held to create no exemption, because a coal mine is, by the statute of *Eliz.*, eo nomine made rateable. In the present instance the subject of the rate is of the same description, “house and lands,” and therefore directly within the statute. What then is to exempt this property from rateability? The answer is, because it yields no profit to the owner, the appellant. Suppose, however, the premises to be let to a tenant at the rent of 123*l.* per annum, the sum at which the sessions seemed to think, if rateable at all, that they ought to be assessed; it seems

(a) 5 A. & E. 1; S. C. 6 N. & M. 383.

(b) 5 T. R. 593.

to be clear that in such case the tenant would be rateable for such occupation. Again, suppose that instead of having paid nothing for it, and taking it as he has with the incumbrance, he had purchased it, and left the whole purchase money unpaid, but secured by mortgage upon the property, in what respect would that charge have differed from the present? Yet in the case lastly supposed, he surely would have been rateable. The case of *Rex v. Adames (a)*, which was quoted in argument in support of the rate, was one of comparative amount of assessment, whether property A. was fairly rated in respect of property B.; but there was no question, as here, of abstract rateability.

Upon the whole we are of opinion "that the said sum of 123*l.* ought not to be deducted from the assumed gross rental in assessing this appellant."

D.

Order of Sessions quashed.

(a) 4 B. &amp; Ad. 61; S. C. 1 N. &amp; M. 662.

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## ELIZABETH HEDLEY v. BAINBRIDGE (b).

**ASSUMPSIT** by the plaintiff as payee of a promissory note for 600*l.* against the defendant, the maker, with counts for money lent and on an account stated. Pleas, to the first count, that the defendant did not make the note; to the others, non-assumpsit. At the trial before *Rolfe B.* at the Durham Spring Assizes, 1841, the plaintiff gave in evidence a note in the following form:—

(b) Decided in Trinity Vacation (June 25).

One partner of a firm of attorneys has no authority to make a promissory note in the name of the firm, though for money delivered to him in the course of business, to

be invested by the firm on mortgage.

*Quære*, whether a note so given is evidence of an account stated by the firm with the payee.

The particulars of demand were, "this action is brought to recover the sum of, &c. due on the promissory note mentioned in the first count of the declaration. Above are the particulars of the plaintiff's demand, for the recovery whereof she will avail herself of the whole or any part of the declaration." *Semble*, the plaintiff is precluded from going into evidence on the count upon the account stated.

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" *South Shields*, 14th Aug, 1839.

" £600. On demand we jointly and severally promise to pay to Mrs. *Elizabeth Hedley* (the plaintiff), or order, the sum of six hundred pounds for value received, with legal interest at five pounds per cent. per annum.

" *Bainbridge & Spurrier*."

The defendant and *Spurrier*, at the date of the note, were in partnership. *Spurrier* had since, and before the commencement of the suit, died. The firm of *Bainbridge & Spurrier* had been attornies to a Mr. *Blagburn*, the executor of a will, under which the plaintiff took a beneficial interest. *Spurrier* was the acting member of the firm in that business, and the note in question was proved to be in his handwriting. There was evidence that he had received the consideration for it in the course of business, to be invested on mortgage. He had also made a part payment of 50*l.* to the plaintiff.

The particulars of demand were in the following form:—

" This action is brought to recover the sum of 555*l.* due on the promissory note mentioned and set forth in the first count of the declaration herein, with interest thereon from the 14th day of August, 1840, to the day of payment.

" Above are the particulars of the plaintiff's demand in this action, for the recovery whereof she will avail herself of the whole or any part of this declaration."

It was objected on the part of the defendant that he was not bound by the signature of his partner to the note made by him in the name of the firm, as the authority of one partner to bind another was implied by law only in the case of mercantile partnerships. It did not appear that the plaintiff relied on any evidence for the jury of any special authority in this case in *Spurrier* to make the note in the name of the firm, but that she depended upon the presumption of law governing trading partnerships. The learned judge nonsuited the plaintiff, giving her leave to move to enter on either of the counts a verdict for the sum due. A rule was obtained accordingly, against which

*W. H. Watson* and *Otter* shewed cause (a). In an ordinary trading business one partner has authority to draw bills for another, which the law allows, because such an authority is necessary in order to carry on the trade. But there is no such necessity and no such authority in the case of a partnership framed to carry on the profession of an attorney, nor is there any instance of presumption by the law of such an authority in a case of any like association. In *Greenslade v. Dower* (b), where two persons had joined for the purpose of farming, it was held that one partner had not authority to accept negotiable instruments in the name of the firm. So in the case of a mining company; *Dickinson v. Valpy* (c). [*Patteson* J. I think it stands upon the facts that this note was given for a joint debt.] So in both the cases cited the consideration moved to the firm, but that is not sufficient to raise an implication of an authority to make a note to satisfy it. To give a negotiable instrument is to change the nature of the liability. [*Bramah v. Roberts* (d) and *Bult v. Morrell* (e) were also cited.]

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*Knowles* and *Hedley* in support of the rule. The cases cited do not establish a rule so broad as that here contended for. The only cases in which it has been distinctly held, that an individual partner has not authority to draw bills, have been those of joint stock companies. In *Greenslade v. Dower* (b), Lord *Tenterden* C. J. and *Bayley* J. both founded their judgment on the fact that the bills were drawn for the purpose of founding a partnership, and Lord *Tenterden* C. J. seems to have thought that one partner in a firm might bind his co-partner by bills given for farming purposes, for that learned judge says, "the mere joint occupation of the farm cannot operate by relation, so as to render

(a) On Wednesday, June 1st, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.


(b) 7 B. & C. 635; S. C. 1 M. & R. 640.

(c) 10 B. & C. 128; S. C. 5 M. & R. 1.

(d) 3 Bing. N. C. 963; S. C. 5 Scott, 172.

(e) 12 A. & E. 745.



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these bills binding." This note ought to be presumed to have been by the authority of the whole, for the consideration was money, which, in law, was received by the firm, and which the firm was liable to repay, it being money received to be invested by one of two attorneys in partnership; *Willet v. Chambers* (a).

At all events the note was evidence of an account stated; *Rhodes v. Gent* (b); and it is open to the plaintiff on these particulars to rely on the count upon that; *Hay v. Fisher* (c).

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—The defendant and a Mr. *Spurrier* were in partnership as attorneys. A sum of money was deposited with Mr. *Spurrier* by the plaintiff, a client of the firm, to be laid out on mortgage, and he gave the plaintiff the promissory note of the firm for the amount. The question is, whether under those circumstances *Spurrier* had power to bind the firm by such note.

No doubt a debt was due from the firm, but it does not follow that one partner had authority to give a promissory note for that debt.

Partners in trade have authority as regards third persons to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do, and this authority is by the custom and law of merchants, which is part of the general law of the land.

But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business.

The point does not appear to have been expressly raised, except in the case of *Greenslade v. Dower* (d), and there it was not determined, for the bills were not accepted in the

(a) Cowp. 814.

(b) 5 B. & Ald. 244.

(c) 2 M. & W. 722.

(d) 7 B. & C. 635; S. C. 1 M. & R. 640.

course of partnership transactions, and were drawn at different lengths of time from those agreed upon with the plaintiff.

Upon the whole we think that the implied authority is confined to partners in trade, and that the nonsuit in this case was right. It was urged that the plaintiff was entitled upon the account stated, but the form of the particulars excluded her from that count, if the note was not valid, and, besides, that point was not made at the trial.

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G.

Rule discharged.

LAZARUS v. COWIE (a).

**ASSUMPSIT** by indorsee against acceptor of a bill of exchange.

Fifth plea: that the defendant, for the accommodation and at the request of the said *Arnold* (the drawer) accepted the bill, and that there never was any consideration or value whatever for the defendant's accepting the same, or paying the amount thereof, or any part of such amount; that the bill was and is an instrument or bill liable to the charges and duties imposed by the statute in such case made and provided; and that the bill, after the defendant had accepted the same as aforesaid, and before the same was indorsed to the plaintiff, to wit, &c. was by the said *Arnold* indorsed and

To a declaration on a bill of exchange, by the indorsee against the acceptor, the defendant pleaded, that the bill was accepted for the accommodation of the drawer and without any consideration for the acceptance; that after the acceptance it was negotiated by the

(a) Decided in Trinity Vacation, 1842 (June 25).

drawer for his own use, and paid by him when it became due, and that afterwards it was reissued by him without a fresh stamp, and indorsed to the plaintiff with notice of the premises.

*Held*, 1st, that the plea was not bad for duplicity, but contained one defence only, viz. the reissuing of the bill under the circumstances without a fresh stamp.

2d, That the reissuing the bill without a fresh stamp was a good defence, inasmuch as being an accommodation bill, which had been satisfied by the drawer, who was the party ultimately liable upon it, it was no longer a negotiable instrument, and could not be put into circulation again without a fresh stamp, as required by 55 Geo. 3, c. 184, s. 19.

And 3d, that it was a defence that did not arise only on the evidence, but might well be pleaded, inasmuch as the 19th section of the same statute inflicts a penalty on re-issuing a bill of exchange after it has been paid, and a bill reissued contrary to such prohibition becomes void.

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negotiated for his own use and benefit; that *Arnold*, when the bill was due and payable, and before the same was indorsed to the plaintiff, to wit, &c. fully paid and satisfied the bill; and that the bill was thereupon then given up and delivered to *Arnold*, fully paid, satisfied and discharged; and that the bill, after the same had been so paid, satisfied and discharged, and given up and redelivered as aforesaid, and also after the same was due and payable, to wit, &c. was without ever having been in any manner restamped, and without the payment, for or in respect of the reissuing of the bill, of any money or duty whatsoever, indorsed by the said *Arnold* to the plaintiff, and was thereupon delivered by *Arnold* to the plaintiff, contrary to the form of the statute in such case made and provided; of all which said several premises the plaintiff, before and at the time when the bill was indorsed to him as aforesaid, had notice. Verification.

Special demurrer and joinder.

The following were the principal grounds of demurrer assigned: That the plea is double and multifarious, inasmuch as it sets forth as a defence that the bill was accepted for the accommodation of *Arnold*, and by him paid at maturity, which alone, if true, would form a good defence; and that it also states, that the bill, having been so accepted for the accommodation of *Arnold*, was by him indorsed to the plaintiff, after the same became due, with notice thereof, which would, if true, form another good and sufficient defence; and that the plea also seeks to comprise a third defence, inasmuch as it alleges that the bill, being a bill liable to the charges and duty imposed on bills of exchange by the statute in such case made and provided, was paid at maturity by *Arnold*, as the drawer thereof, for his own accommodation, and by him reissued without being restamped, or a fresh duty being paid in respect thereof, contrary to the form of the statute. That the plea is so pleaded that it is impossible for the plaintiff to make any single replication thereto, which shall not admit facts stated in the plea, which would form a defence to the action on the said

first count. That the allegation in the plea, that the bill was and is a bill liable to the charges and duty imposed by the statute in such case made and provided is uncertain, and that it is impossible for the plaintiff to take any issue thereon. That the absence of a stamp does not vitiate a contract or bill of exchange, but merely renders the same unavailable in evidence. That the fact of a bill of exchange wanting a stamp, or of the insufficiency thereof, is to be tried and adjudicated upon by the judge, and ought not to be submitted to the country. That the plea is a plea to evidence merely.

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*J. W. Smith* in support of the demurrer (a). This plea is bad, on the authority of *Haward v. Smith* (b). The defence is, that the bill was paid and reissued without a fresh stamp, which that case establishes is not a matter that can be pleaded. If, to avoid this objection, the defendant urges that his plea contains matter of defence ultra, then it is bad for duplicity.

*Flood* contra. If the want of a stamp under the circumstances is no defence, the plea cannot be bad for duplicity. A plea is double only, when it contains more than one defence (c). Here the utmost the plaintiff says is, that the plea contains what is a sufficient defence, involved with something else which is no defence at all. Then the latter part is surplusage, and may be rejected as such; the plea therefore cannot be considered double. But the want of a stamp under the circumstances shewn in the plea is pleadable, and is a good defence. *Haward v. Smith* (b) only shews that a plea "that a bill was not *duly* stamped with the *proper* stamp" was ill, as being uncertain and leaving the plaintiff in doubt what he ought to traverse, and what was the question raised, whether of law or fact. The ex-

(a) The case was argued June 20, before Lord Denman C. J., Patteson, Williams and Wightman Js.

(b) 4 Bing. N. C. 684.

(c) See *Wright v. Watts*, ante, 386.

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istence of the stamp would have been a question of fact for a jury, which might be submitted to them; the sufficiency of it a question of law, and therefore for the Court. But it is nowhere said in that case, except in argument, that, under certain circumstances, the want of a stamp would not be a pleadable defence. The whole plea must be taken together, and so will form but one defence. If the objection as to the stamp had not been taken, there would have been no defence shewn at all. It would be no defence to say, that a bill had been negotiated after it was due, if the indorsee had given value for it. It would only make it necessary for the indorsee to shew that he had in fact given value for it. Then again to plead that the drawer had reissued the bill, after it had been paid, without a fresh stamp, would, as to the acceptor, be no defence, unless the plea shewed that it was an accommodation bill. [*Patteson J.* It is done every day.] But where it is shewn to have been an accommodation bill, there the drawer is ultimately liable, and therefore the defence is, that when the drawer took up the bill, it was at an end, as much as if the acceptor had paid a bill in an ordinary case, and in consequence that a fresh stamp was necessary.

*J. W. Smith* in reply. The plea is multifarious. It contains, in fact, at least three defences, first, that the bill was an accommodation bill, which was paid at maturity by the drawer, and afterwards reissued by him, of which the plaintiff had notice. This, even without any allegation of notice, would be a sufficient defence without reference to the Stamp Act. Secondly, that this accommodation bill was indorsed to the plaintiff, when overdue, of which the indorsee had notice. Thirdly, the plea sets up an answer that rightly should arise on the evidence, and therefore is certainly not a good defence in a plea, though it may be sufficient, if not specially demurred to. That the want of a stamp is an objection that arises on the evidence and not on the pleadings is clear from ordinary practice. If an objection to the stamp affixed to an instrument is not taken

at the right time in a trial, even though it should be observed afterwards, the judge always directs the jury, that there is a good cause of action, notwithstanding the defect of the stamp. Even if this be not so, the defendant has no right to seek to put several even immaterial matters in issue; *Regil v. Green* (a). There the demurrer was to the replication for duplicity, and it was argued by the defendant's counsel, that the plaintiff could not state immaterial matter as distinct matters of traverse, and so embarrass the defendant, and then say it is of no consequence, because they are immaterial. And this view was adopted by the Court. Parke B. says, "This is not precisely duplicity, but the plaintiff has no right to include several matters in his replication so as to embarrass the trial." [*Patteson J.* Does the plea contain any unnecessary allegation, if the defence was only meant to be the want of a stamp?] It was not necessary to aver notice, if the defence is directed only to the want of a stamp, and *Regil v. Green* (a) shews that, if immaterial, the defendant ought not to have embarrassed his plea by such an averment.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—In the case of *Charles v. Marsden* (b), it was held to be no defence that a bill was an accommodation bill, and indorsed to the plaintiff after it became due, unless it had been shewn also that it was agreed not to be indorsed after due: according to that case the indorsee after it is due stands in the shoes of the indorser in other cases but not in accommodation bills. Again, if a bill is paid by the drawer before due, yet he may reissue it before due; *Burridge v. Manners* (c); or, if he pay it when due, he may also reissue it; *Callow v. Lawrence* (d). This plea therefore contains no defence without the averment of want of stamp. All the other averments do not make a defence;

(a) 1 M. & W. 328.

(b) 1 Taunt. 224.

(c) 3 Camp. 194.

(d) 3 Mau. & S. 95.

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neither should it appear that they were intended so to do, but are introductory only, and necessary under the circumstances to raise the defence of want of stamp. The averment of notice to the plaintiff, at the end, is indeed unnecessary; but it is equally so if the other part of the plea be supposed to be a defence. The plea therefore is not multifarious, but is one defence, viz. want of a stamp.

Then is such a defence pleadable? The case of *Haward v. Smith* (a) only decides that a plea that the bill has no proper stamp is bad, because it is doubtful whether such plea means to deny there is any stamp at all (which it seems in that case to have been conceded would be a question for a jury), or that it had an insufficient stamp, which would be a question for the Court, and so the plea was held to be uncertain. Here the plea states that there was no fresh stamp: that is a question for the jury, and, if under the other circumstances stated in the plea, the bill required a fresh stamp: the plea is good. Now it cannot be denied that, if a bill be paid when due by the person ultimately liable upon it, it has done its work, and is no longer a negotiable instrument. No person could sue on it. No person remains liable on it. If put into circulation again, it becomes a new bill, payable at sight, and must have a fresh stamp: 55 Geo. 3, c. 184, s. 19; *Holroyd v. Whitehead* (b). If a bill therefore be paid when due, by the acceptor, it clearly cannot be reissued without a fresh stamp; if so paid by the drawer, being also payee, it might in ordinary cases be reissued without a fresh stamp: *Callow v. Lawrence* (c). But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable, and his payment discharges the bill altogether. It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases, but the 19th section of 55 Geo. 3, c. 184, above mentioned, expressly prohibits the reissuing a bill of exchange which has been paid,

(a) 4 Bing. N.C. 684. (b) 1 Marsh. 140. (c) 3 Mau. & S. 95.

and inflicts a penalty of 50*l.* on any person doing it. A bill issued contrary to such prohibition is certainly void.

We think upon the whole that this may be pleaded, and that our judgment must be for the defendant.

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### Judgment for defendant (*a*).

(*a*) This and a few other cases are reported by Mr. *William Robert Seymour Fitzgerald* without signature in this volume.

### RICHARDS v. DYKE and another.

*Friday,*  
*April 23d.*


DEMURRER to a declaration in prohibition. The declaration stated "that the defendants prosecuted a plea in the Consistory Court of the diocese of Hereford, against the plaintiff, and to which the plaintiff had before then appeared under protest against the jurisdiction of that court, and the defendants did in that plea exhibit a certain libel against the plaintiff, wherein the defendants did allege" the making of a church rate, the defendant's proportion thereof, his liability to pay it, and request to him to do so; "notwithstanding which the plaintiff did refuse and neglect to pay the same, and the defendants did by the said libel further allege and propound that the plaintiff was of the said parish and diocese, and thereby subject to the jurisdiction of the said court; and the defendants by the said libel did pray that the plaintiff should be condemned in the payment of the said several sums of 12*s.* 9*d.* and 4*s.* 6*d.*, 12*s.* 9*d.* and 11*s.* 1*d.*, and 9*s.* 4½*d.* and 3*s.* 2½*d.*, making together the sum of 2*l.* 13*s.* 8*d.*, so rated and assessed upon him as aforesaid; as also that he should be condemned in the costs made and to be made in the said suit, by and on the part and behalf of his said parties: and the plaintiff tested against it, on the ground that the amount to be recovered was under 10*l.*, and that the validity had not been disputed by the plaintiff, as after such a proceeding in the ecclesiastical court he would be unable to contest the jurisdiction of the justices, by denying the validity of the rate or his liability to pay it.

A prohibition will go to the ecclesiastical court in a suit to enforce the payment of a sum under 10*l.*, due upon a church rate, where neither the validity thereof nor the liability of the party to pay it is disputed.

A declaration in prohibition sufficiently discloses that they are not disputed, which alleges that the defendant appeared in the ecclesiastical court under protest against the jurisdiction, and afterwards pro-



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further says that afterwards, to wit, on the 6th day of November, A. D. 1839, at a holding of the court, being a day appointed for the plaintiff to answer the matters contained in the said libel, the plaintiff appeared, and then objected to and protested against the jurisdiction of the said court, and to the said libel, and to any proceedings being had or taken thereon, on the ground that the said suit was brought for church rates under 10*l.*, the validity of which or any of them had not been disputed or denied by the plaintiff, and that it did not appear in or by the said libel that the plaintiff had disputed or denied the validity of them, and that the proceedings against the said plaintiff for the recovery of the said church rates ought to have been before justices of the peace, according to the statute in that case made and provided. Nevertheless the plaintiff says that afterwards, to wit, on the 4th day of December, A. D. 1839, the said court proceeded to hold jurisdiction in the said suit, and made a decree therein for a monition against the plaintiff for his personal answers to the said libel in the said suit, and to appear at a court to be holden on Wednesday, the 8th day of January, 1840, and the said suit is still pending in the said court: and the plaintiff further says that the said sum or sums, at which he the plaintiff was so rated for church rates as in the said libel mentioned, or any or either of them, never did amount to the sum of 10*l.* And the plaintiff further says that no proceeding or proceedings whatever hath or have been at any time had or taken, nor has any complaint been made against him before any justice or justices of the peace, for the recovery of the said church rates or any or either of them, or any part thereof. And the plaintiff further says, that he hath not at any time disputed the validity of the said church rates or any or either of them, or any part thereof, or his liability to pay the same, or any or either of them, or any part thereof. And because the said suit for the recovery of the said church rates ought not to have been commenced, instituted or prosecuted against the plaintiff, and because the subject-

matter of the said suit was not nor is for ecclesiastical cognizance and jurisdiction, and the said church rates ought to have been recovered by proceedings before justices of peace, in pursuance of and according to the statute in that case made and provided, &c. Wherefore, &c." General demurrer.

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*F. Robinson* in support of the demurrer (*a*). The question in this case is, whether the jurisdiction of the ecclesiastical court is taken away altogether by the stat. 53 Geo. 3, c. 127, s. 7, in suits for church rates, where the sum claimed does not exceed 10*l.* and the validity of the rate is not in dispute. That jurisdiction is not taken away by the statute in question. It recites that "whereas it is expedient that church or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered," and enacts "that from and after the passing of this act, if any one duly rated to a church rate or chapel rate, the validity whereof has not been questioned in any ecclesiastical court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty or town corporate, where the church or chapel is situated, in respect whereof such rate shall have been made, upon the complaint of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath (which oath the said justices are hereby empowered to administer) into the merits of the said complaint, and by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed 10*l.* over and above the reasonable costs and

(*a*) Before Lord Denman C. J., Patteson, Williams and Wightman Js.

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charges, to be ascertained by such justices ; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, together with the amount of such costs and charges, by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or her, the necessary charges of distraining being thereout first deducted and allowed by the said justices ; and any person finding him or herself aggrieved by any judgment given by two or more such justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty or town corporate wherein the church or chapel is situated, in respect whereof such rate shall have been made, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment if they shall see cause ; and if the justices then present, or the major part of them, shall find cause to affirm the judgment given by the first two or more justices, the same shall be decreed by order of sessions, with costs, against the appellant, to be levied by distress and sale of the goods and chattels of the said party appellant : Provided always, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined : Provided also, that nothing herein contained shall extend to alter or interfere with the jurisdiction of the ecclesiastical courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l.*, from the party proceeded against : Provided likewise, that if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may

then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed: Provided likewise, that nothing herein contained shall affect any regulations that may have been made by authority of parliament respecting the church rates or chapel rates of any particular parishes or districts."

The second proviso introduces the difficulty. This question arose in the case of *Ricketts v. Bodenham* (a), but it was not necessary to decide it there. The judgment of the Court proceeded on the ground that it appeared that the validity of the rate had been questioned in the ecclesiastical court. Lord Cottenham C., in *In re Baines* (b), observed, that the opinion of the Court of Queen's Bench, in *Ricketts v. Bodenham* (a), was not the ground of the judgment; and his lordship declined to decide the point. In *Reg. v. Thorogood* (c) it was treated by the judgment of this Court as a doubtful one.

The remedy given by the statute is cumulative, and not in substitution of the ancient jurisdiction. The primary object of the statute was to advance the remedy for the withholding of church rates, and it ought therefore not to receive a construction which would abridge any existing remedy. The Lord Chief Justice of the Common Pleas, in pronouncing the judgment of the Court of Exchequer Chamber in *Veley v. Burder* (d), said that the spiritual court had general power and jurisdiction, "after a legal rate had been imposed, to compel each individual to contribute the sum assessed upon him." "It is a clear principle that, where the superior courts have jurisdiction, it can only be taken away from them by express enactment or by necessary implication:" per *Ashurst J.*, in *Shipman v. Henbest* (e). *Rex v. Sanchee* (f) is a direct authority that a

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(a) 4 A. & E. 433; S.C. 6 N. & M. 170.

(b) 1 Crainig & Ph. 43.

(c) 12 A. & E. 183; S.C. 3 P. & D. 629.

(d) 12 A. & E. 310; S.C. 4 P. & D. 500.

(e) 4 T. R. 116.

(f) 1 Ld. Raym. 323.

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statute simply giving remedy at common law, for a thing before recoverable in the spiritual court only, does not take away the jurisdiction of the spiritual court. The general principle is laid down in accordance with that case in 2 *Saund.* (a), in *Vin. Abr.* Statute (E 1), in *Dr. Foster's* case (b), in *Rex v. Carlile* (c).

The statute 7 & 8 *Will.* 3, c. 6, gives a remedy for the recovery of tithes of small amount by summons before justices. It is in terms similar to this statute, yet it did not oust the original jurisdiction, to effect which object it was necessary to pass the stat. 5 & 6 *Will.* 4, c. 74.

*Rex v. Milnrow* (d) shews what is necessary to oust the justices of the peace of their jurisdiction altogether. It is sufficient that the party summoned for non-payment gives notice of his intention to dispute the validity of the rate.

The averments in the declaration are not sufficient to raise the point. It is not shewn that the ecclesiastical court exceeded its jurisdiction. It is not shewn that there is no dispute touching the validity of the rate, nor that that court is proceeding to enforce the payment of the rate, both of which ought to be shewn affirmatively to give rise to the question. It is clear that the ecclesiastical court has jurisdiction to commence proceedings, and there is nothing on the face of these proceedings to shew that it ought now to stop them. It is submitted that nothing short of an admission that the defendant does not dispute the validity of the rate, can give jurisdiction to the justices. He is bound to follow the very words of the act, and shew that it is not a suit touching the validity of the rate. It is consistent with the averments here that it was a matter of notoriety that the validity was disputed. If the ecclesiastical court has jurisdiction at all to entertain the suit, it is to be presumed that it will stay its proceedings should any matter arise, that according to a true construction

(a) P. 155, note 4, to *Rex v. Dickenson*.

(c) 3 B. & Ald. 161.

(d) 5 Mau. & S. 248.

(b) 11 Rep. 56.

of the statute in question, ought to arrest them: *Hall v. Maule (a)*.

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Sir *F. Pollock* A. G. contrâ. The object of this statute was not, as suggested, to afford a more expeditious mode of compelling the payment of church rates in general in addition to the existing machinery, but to relieve those persons who, without disputing the legal validity of them, conscientiously refused to pay, by visiting them with a punishment more commensurate with their offence than that by which alone the ecclesiastical court can enforce its decrees. The statute should receive a construction to advance that remedy, and suppress that mischief. The present is an attempt to restore all the mischief of the old state of the law, in contempt of this Court and in defiance of an act of parliament. On the construction of that act this Court expressed a clear and decided opinion in *Ricketts v. Bodenham (b)*. The plaintiff here protested against the jurisdiction of the ecclesiastical court on this ground. The declaration shews sufficiently that the validity of the rate is not in dispute. After what the plaintiff has done in the ecclesiastical court, he could not oust the jurisdiction of the justices by contesting the validity of the rate before them. That jurisdiction is not ousted but by a bonâ fide objection to the rate: *Rex v. Wrottesley (c)*, *Reg. v. Sillifant (d)*.

The statute for facilitating the recovery of tithes has no analogy to this statute. It was obviously passed for the benefit of the tithe-owner; besides which, the 14th section shewed clearly the intention of the legislature to be not to oust the superior jurisdiction.

*F. Robinson* replied.

*Cur. adv. vult.*

(a) 7 A. & E. 721; S. C. 3 N. & P. 459.

(c) 1 B. & Ad. 648.

(b) 4 Ad. & E. 433; S. C. 6 N. & M. 170.

(d) 4 A. & E. 354; S. C. 5 N.

& M. 640.

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Lord DENMAN C. J. delivered the judgment of the Court in Trinity term following (May 31).—In this case the question is directly raised, whether the 7th section of 53 *Geo. 3*, c. 127, has taken away the jurisdiction of the ecclesiastical courts to enforce the payment of a church rate, where the sum does not exceed 10*l.*, and where the validity of the rate and the liability of the party are undisputed.

This Court has already expressed a strong opinion in the affirmative in the case of *Ricketts v. Bodenham* (a), but, as the validity of the rate was disputed in that case, the jurisdiction of the ecclesiastical court clearly remained, and it became unnecessary to act upon that opinion. So in the subsequent cases of *Reg. v. Thorogood* (b) and *Reg. v. Baines* (c) and *In re Baines* (d), it was unnecessary to determine the question now raised. We adhere to the interpretation put upon the statute in the case of *Ricketts v. Bodenham* (a), and for the reasons there stated. The two provisos by which the jurisdiction of the ecclesiastical courts is declared not to be altered or interfered with, whenever the validity of the rate or the liability of the party is disputed, or the sum demanded exceeds 10*l.*, shew the intention of the legislature, that such jurisdiction should be altered and interfered with where the sole object is to enforce an undisputed rate for a sum not exceeding 10*l.*, that being the only case in which jurisdiction is given to justices of the peace. The proviso was indeed unnecessary so far as regards cases where the sum exceeds 10*l.*, and can only have been inserted ex majori cautela, still it shews the intention of the legislature. If however the jurisdiction of the ecclesiastical courts be altered and interfered with in such cases, it can only be by taking it away. The general rule of law and construction undoubtedly is, that where an act of parliament does not create a duty or offence, but only adds a remedy in respect of a duty or offence which existed before, it is to be con-

(a) 4 Ad. & E. 433; S. C. 5 N. & M. 640.

(c) 13 A. & E. 210; S. C. 4 P. & D. 362.

(b) 12 Ad. & E. 183; S. C. 3 P. & D. 629.

(d) 1 Craig & Ph. 31.

strued as cumulative, but this rule must in all cases be applied with due attention to the language of each act of parliament. For instance, the 4th section of the act in question extends the provisions of 7 & 8 Will. 3, c. 6, s. 1, respecting the recovery of small tithes before justices, from 40s. to 10l., and on reference to that act, section 8, it will be found that, if any person charged before the justices shall insist upon any prescription, custom or modus, the justices shall forbear to give any judgment in the matter, and *that then and in such case* the person complaining shall be at liberty to prosecute in any other court, where he might have sued before the making of this act, any thing in this act to the contrary notwithstanding. This section is nearly as strong as section 7 of the act now under consideration, except that it does not mention in express terms *altering or interfering with* the jurisdiction of the ecclesiastical courts. Yet it is plain that the legislature did not intend to take away that jurisdiction, for by section 14 it is provided, that any person, who shall begin any suit for small tithes in the Court of Exchequer, or in any of the ecclesiastical courts, shall have no benefit by this act for the same matter, evidently treating the remedies as concurrent. The omission of any similar clause in the act under consideration strengthens our opinion that it was intended to take away the jurisdiction of the ecclesiastical courts. We are not called upon, in this any more than in the former cases already referred to, to determine whether it be necessary, in order to give jurisdiction to the ecclesiastical court, that the fact of a dispute existing respecting the validity of the rate or the liability of the party, should appear upon the face of the libel. That court has general jurisdiction in matters regarding church rates, and perhaps this is rather a question of practice or pleading in that court.

It is sufficient for us to say, that it does appear that the absence of any dispute as to the validity of the rate or the liability of the party was shewn to the ecclesiastical court, and it is averred, and not denied, that the court proceeded

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notwithstanding. Objections were taken as to the form in which that was shewn by the plaintiff in this action, and it was contended that he might, notwithstanding any thing which he has alleged in the ecclesiastical court, set up before the justices that he disputed the validity of the rate or the liability to pay it.

We think that these objections cannot prevail, and that he is concluded by what he has alleged. Our judgment will therefore be for the plaintiff.

G.

Judgment for the plaintiff.

Friday,  
April 29th.

ANDERSON and others v. THORNTON.

To debt on bond the defendant, after setting out the bond, which recited that *G.* had been appointed clerk to a banking Company, and was conditioned for his fidelity while in the service of the Company, pleaded that before any breach, "to wit, on the 1st January, 1836, *G.* was appointed manager; that

the office of manager is different from that of a clerk and the responsibilities greater; that *G.* did from the day and year aforesaid cease to be clerk of the Company, and that he performed the condition whilst he was clerk and before he was appointed manager.

*Held*, on special demurrer, that the plea was bad, because, the time of *G.*'s appointment as manager being immaterial and laid under a videlicet, the plea, if put in issue, might have been supported by proof that *G.* had been appointed manager on some day previous to the day mentioned, and that he ceased to be clerk on the day mentioned, or some subsequent day, so as to leave an interval between the appointment to be manager and the ceasing to be clerk, and therefore the plea did not shew that *G.* ceased to be clerk when he became manager.

**DEBT** on bond. The second plea set out the bond on oyer. The bond, which bore date the 12th December, 1835, was a joint and several bond for 4000*l.* payable to the plaintiffs by *Charles Goldney Rees, Richard Thornton*, the defendant, and *Nathaniel Penry Rees*, and was conditioned as follows:—"Whereas the above bounden *C. G. Rees* has been appointed one of the clerks of a certain public joint stock banking company called the London and Westminster Bank, of which Company, and for the general purposes thereof, the above named *Samuel Anderson, Henry Bosanquet, Frederick Burmester, Charles Gibbes and Henry Harvey* (the plaintiffs), have been appointed trustees, and it was agreed that on the appointment of the said *C. G. Rees* to be such clerk as aforesaid, he should with sureties enter into

a bond to guarantee his fidelity and honest conduct while in the service of the said Company. And whereas each of them the above bounden *R. Thornton* and *N. P. Rees* at the request of the said *C. G. Rees* agreed to become sureties as aforesaid to the extent of 1000*l.* each: now the condition of the above written bond and obligation is, that if the said *C. G. Rees* do and shall from time to time *while he shall continue in the service of the said Company* diligently and faithfully serve them, and devote the whole of his time and attention to their business and give such reasonable attendance at their banking house as the directors or managers for the time being of the said Company shall from time to time require, and shall keep all the secrets of the said Company, and inform the said directors of the Company for the time being of all such letters, writings, papers and occurrences whatsoever, as shall from time to time come to his knowledge respecting the said business, and do and shall from time to time account for, render and make over to the directors for the time being of the said Company, all such cash, bills, notes and other securities as shall from time to time come, or without his wilful default might have come, to his hands, and shall not embezzle, conceal or waste, or permit, as far as in him lies, to be embezzled or wasted by others, any of the property of the said Company, or which shall have been entrusted to their care; and also if the said *C. G. Rees* do and shall in all other respects diligently, skilfully and faithfully, demean and conduct himself *as one of the clerks* of the said Company, and perform the duties of the said office *in that or any other capacity*; and moreover, if they the said *R. Thornton* and *N. P. Rees*, their executors or administrators, or some of them, shall and do and well and sufficiently save harmless and keep indemnified the said Company, and the directors and all other members thereof, from and against all losses, costs, charges, damages and expenses, which shall or may happen or come to them from or by reason of any deed, matter or thing whatsoever, done or

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omitted to be done by the said *C. G. Rees* in or during his service, then the above written obligation shall be void, but otherwise the same shall be in full force. Provided always and it is hereby declared that under the said obligation the said *R. Thornton*, his heirs, executors or administrators, shall not be liable to a greater sum in the whole than one thousand pounds, nor the said *N. P. Rees*, his heirs, executors or administrators, to a greater sum in the whole than one thousand pounds," &c.

The plea then stated, that after the making the bond, and before any breach of the condition, *to wit, on the first day of January, 1836*, *C. G. Rees* was duly appointed by the Company to be a *manager* of a certain branch of the business of the said Company, to wit, manager of the Whitechapel Branch Bank of the Company, and *C. G. Rees* thenceforward hath been employed by the Company as *manager* of the said branch bank of the Company. That the duties and responsibilities of such manager as in the plea mentioned are much greater than the duties and responsibilities of a clerk of the Company as in the condition of the bond mentioned, and that the office of such manager as aforesaid is other and different than the said office of clerk in the condition mentioned. That *C. G. Rees* did from the day and year aforesaid cease to be such clerk of the Company as in the condition of the bond mentioned. That while *C. G. Rees* continued such clerk as aforesaid and before he was appointed such manager as aforesaid, he did well and truly fulfil, keep and observe all matters and things in the condition mentioned by him to be performed, fulfilled, kept and observed. And the Company did not, nor did the directors, nor did any member thereof, sustain any loss, costs, charges, damages or expenses, for or by reason of any debt, matter or thing whatsoever done or omitted to be done by *C. G. Rees* in or during the service as in the condition mentioned, and before he was appointed such manager as aforesaid. Verification, &c.

Special demurrer, on the ground that the bond is condi-


tioned for the faithful service of *C. G. Rees whilst he continued in the service* of the Company, and the plea merely states that he was appointed manager, and was employed as such, but it is not stated that he was employed in no other capacity as well as that of manager. That it is not shewn that the duties of a manager were not within the condition, nor that *C. G. Rees* did not after his appointment as manager also perform other services within the meaning of the condition, nor that he did not perform the duties of manager in conjunction with other services. That it is no answer to the action nor any performance of the condition to shew that *C. G. Rees* committed no breach thereof before he was appointed manager. That the plea confesses a breach, and does not avoid it. That it is consistent with the plea that *C. G. Rees* was employed as alleged as manager, and also continued in addition thereto to perform such services for the faithful performance of which the bond was given. That the plea does not shew performance during all the time that *C. G. Rees* continued in the service of the Company according to the condition; that it is a plea of part performance only. That it is argumentative, &c.

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Sir *W. W. Follett* S. G., in support of the demurrer (a), contended that the plea was bad, as it did not state that *Rees* relinquished the office of clerk on his appointment to the office of manager, and also that the bond was in fact conditioned for the fidelity of *Rees*, not merely so long as he should be clerk, but generally, "while he shall continue in the service of the said Company." He referred to *Augero v. Keen* (b).

*Erle*, contra, contended that the general words relied upon on behalf of the plaintiff were to be restricted by the recital, which was part of the same sentence, and shewed

(a) The case was argued before *Williams* and *Wightman* Js.  
 Lord Denman C. J. *Patteson*, Wil- (b) 1 M. & W. 390.

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that nothing was contemplated but fidelity in the office of clerk: *Lord Arlington v. Merrick* (a), *African Company v. Mason* (b), *The Proprietors of Liverpool Waterworks v. Atkinson* (c), *Payler v. Homersham* (d), *Simons v. Johnson* (e). On the general question of the surety's liability, he cited *The Wardens of St. Saviour's, Southwark, v. Bostock* (f), *Peppin v. Cooper* (g), *Hassell v. Clark* (h), *Wright v. Russell* (i). As to the cessation of the surety's liability on a change in the risk, he cited *Barclay v. Lucas* (k), *Strange v. Lee* (l), *Bellairs v. Ebsworth* (m).

Sir *W. W. Follett* S. G. in reply. The general words relied upon for the plaintiff are themselves in the recital as well as in the operative part of the condition. A recital never confines subsequent words, by which the intent appears more large: *Com. Dig. Parols*, (A 19), *Sansom v. Bell* (n). The plea does not negative the continuance of *Rees* in his office of clerk.

*Cur. adv. vult.*

LORD DENMAN C. J., in the Trinity term following (June 9), delivered the judgment of the Court as follows:— This was an action of debt on bond. The defendant, after craving oyer of the bond, which recited that one *C. G. Rees* had been appointed one of the clerks of a banking Company, and was conditioned for his fidelity, &c., whilst in the service of the Company, pleaded in substance that, before any breach of the condition, *to wit, on the 1st of January, 1836*, *C. G. Rees* was appointed manager; that the office of manager is different from that of clerk, and the

(a) 2 Wms. Saund. 414, and notes.

(b) Cited in *Stibbs v. Clough*, 1 Str. 227.

(c) 6 East, 507.

(d) 4 Mau. & S. 423.

(e) 3 B. & Ad. 175.

(f) 2 B. & Pul. (N. R.) 175.

(g) 2 B. & Ald. 491.

(h) 2 Mau. & S. 363.

(i) 3 Wils. 530.


(k) 1 T. R. 491, n.

(l) 3 East, 484.

(m) 3 Campb. 53.

(n) 2 Campb. 39.

responsibilities greater; that *C. G. Rees* did, *from the day and year aforesaid, cease to be clerk* of the Company, and that he performed the condition whilst he was clerk and *before he was appointed manager*.

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To this plea there was a demurrer, and upon the argument two points were insisted upon for the plaintiffs. 1st. That the condition of the bond is not limited to service by *C. G. Rees* as clerk only, but extends to any other employment of *C. G. Rees* in the service of the Company. 2d. That it does not appear by the plea that *C. G. Rees* ceased to perform the service of a clerk to the Company upon his being appointed manager, and consequently that a plea of performance until he was appointed manager is insufficient.

Upon the first of these objections it is unnecessary to give any opinion, as we think the second must prevail, and that the plea is bad for not alleging that *C. G. Rees* ceased to be clerk of the Company when he was appointed manager.

It is perfectly consistent with the allegations in this plea that *C. G. Rees* continued to be clerk *after* he was appointed manager, and the performance ought not to have been limited to the time of his being appointed manager. The plea, if put in issue, would have been supported by proof, that *C. G. Rees* had been appointed manager on some day *previous* to the day stated in the plea (the time being laid under a *videlicet*, and not material), and that he ceased to be clerk *on* the day stated in the plea, or some *subsequent day*, leaving an interval between the appointment to be manager and the ceasing to be clerk, it not being alleged in the plea that he ceased to be clerk when he was appointed manager, and it not appearing that the offices are necessarily inconsistent. There may therefore have been an interval during which a breach occurred, which is not covered by the plea, and we are therefore of opinion that the plaintiffs are entitled to judgment.

D.

Judgment for the plaintiffs (a).

(a) See *Chapman v. Beckington*, *post*, Mich. T. 1842.

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Thursday,  
April 28th.

**Assumpsit.** The declaration stated that heretofore, to wit, on the 29th September, 1840, in consideration that plaintiff at the request of defendant *had* bought of defendant a certain horse, at a certain price, to wit, 30*l.*, defendant promised plaintiff that the horse was sound and free from vice.

*Held*, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of

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**ASSUMPSIT.** The declaration stated that heretofore, to wit, on the 29th September, 1840, in consideration that the plaintiff at the request of the defendant *had* bought of the defendant a certain horse, at a certain price, to wit, 30*l.*, the defendant promised that the horse did not exceed five years off, and that it was sound in wind and limb, perfect in vision, and free from vice; nevertheless the defendant did not keep his promise, but deceived and defrauded the plaintiff, in this, to wit, that the horse at the time of the making of the promise of the defendant was not free from vice, but on the contrary thereof, was very vicious, &c., whereby, &c.

The plaintiff, upon the issues joined in this case, had obtained a verdict at the Cornwall Spring Assizes, 1841.

*Bompas* Serjt. in the following Easter term, obtained a rule nisi to arrest the judgment.


*Erle* and *Butt* now shewed cause (a). It is objected that the declaration does not state the defendant's promise, by way of warranty, to have been made at the time of the sale, and that no action can be maintained upon the promise alleged in respect of an executed consideration. But it must be taken after verdict that the promise was an express promise, and such a promise, though subsequent, is supported by a past consideration, where the consideration has been moved by a precedent request, which is alleged in this declaration. "Where *A.*'s servant was arrested in London for a trespass, and *J. S.*, who knew *A.*, bailed him, and afterwards *A.*, for his friendship, promised to save him harmless, and *J. S.* comes to be charged; yet it is held

(a) Before Lord Denman C. *J. Patteson, Williams* and *Wightman* Js.

the only implied promise was to deliver the horse on request, and that after the sale therefore there was no consideration for the subsequent express promise of warranty.

that this is no consideration to ground an assumpsit, because the bailing, which was the consideration, was past and executed before. But it had been otherwise if the master had previously requested him to become bail for his servant, *Dy. 272 a, Hunt v. Bate, 1 Roll. Abr. 11, (Q), pl. 2, 3*, because the promise is not a naked one, but couples itself with the precedent request, and with the merits of the party which were procured by that request, and is therefore founded upon a good consideration. *Hob. 106. Lampleigh v. Braithwaite:*" 1 *Wms. Saund. 264, n. (1)*.

But it is not necessary to contend that the promise is good, although made in respect of a past consideration, for it appears upon the declaration that the warranty was given at the time of the sale. The only date given is the 29th September, 1840, at which time the sale is alleged to have taken place, and the same allegation must be carried on to the warranty, as forming together with the sale one transaction. If the declaration had said "the defendant *then* promised," it would have been entirely free from objection. But the omission of the word "then" would not be ground of general demurrer, and cannot therefore be taken as a ground for arresting the judgment. In *Thornton v. Jenyns(a)*, where *Brown v. Crump(b)*, which may be relied upon by the defendant, was cited, a similar objection was taken to the declaration on demurrer. It was said that the plaintiff's promise, which was the consideration for that of the defendant, appeared on the record to have been made antecedently to the defendant's promise. But it was answered by *Tindal C. J.*, "the language of this declaration is quite compatible with the supposition that the parties being together, the promises were then concurrently and mutually made. I think that the fair and reasonable intendment of this allegation is, that the word "then" relates to the same period of time in the case of both promises; and that we are not bound to refer the one promise to a period antecedent to the other, although the plaintiff's promise may possibly

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(a) 1 M. & Gr. 166; S. C. 1 Scott, N. R. 52. (b) 1 Marsh. 567.



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have preceded the defendant's, but that we may take them to have been simultaneously made."

*Bompas* Serjt. and *Slade* contrà. It is not contended that a bygone consideration, executed at request, will not support *any* subsequent express promise, but it is submitted that such a consideration will not support a more extended promise than the law would imply, while the consideration was executory. The express subsequent promise to the extent of the promise which would be so implied, is good, for the rest it is nudum pactum. For instance, at the time of selling this horse, no other promise was implied on the part of the defendant, than that he should deliver the horse to the defendant. If therefore after the sale, in consideration that the plaintiff *had* bought his horse, the defendant promised to deliver it, *and* that it was of the blood of Eclipse, the latter branch of his promise would be nudum pactum. The proposition may be put generally, that it is only in cases in which, while the consideration is executory, the law would imply a promise, and thus exonerate the plaintiff from proving a promise at the trial, that, the consideration being executed, an express promise will give a right of action. Upon a sale of goods, the law implies no promise that they are of a particular quality: *Parkinson v. Lee* (a). Such a promise therefore must be proved; and if made after the sale would be nudum pactum. "The warranty must be *upon the sale*; for if it be made *after* and not *at* the time of the sale, it is a void warranty; for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor:" 3 Bl. Com. 165. "The warranty must be made upon the bargain, and at the time of the bargain; otherwise it is not good without deed:" Com. Dig. Action upon the case for a deceit (A 11). In *Roswell v. Vaughan* (b), which was an action on the case for deceit in selling tithes, which the defendant had no property in, it was moved in arrest of

(a) 2 East, 315.

(b) Cro. Jac. 196.

judgment, "here is not any warranty nor affirmance at the time of the sale, that he had any right or title to sell, for his affirmance that he was vicar, and had right to sell, was upon the 9th of June, and the sale was the 16th June after," and judgment was arrested. A similar objection was taken to the declaration in *Pope v. Lewyns* (a), but the point was not decided. In *Hopkins v. Logan* (b), it was said by *Maule* B. "I agree that the executed consideration is no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration." In *Collins v. Godefroy* (c) a subsequent express promise was held void, on the ground that there was no implied promise at the time of the transaction. In *Thornton v. Jenyns* (d) the word "then," which is omitted in this declaration, was introduced, the words being "in consideration that the plaintiff *had then* promised, &c., the defendants *then* promised, &c. [*Patteson* J. referred to *Eastwood v. Kenyon* (e).] In this declaration the 29th September is given as the date of the *promise*; the time of sale is not alleged, and may have been twenty years before the promise.

*Cur. adv. vult.*

Lord DENMAN C. J. in the Trinity term following, (May 30), delivered the judgment of the Court as follows:—This was an action of assumpsit for breach of warranty of the soundness of a horse.

The first count of the declaration, upon which alone the question arises, stated, "that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of 30*l.*, the defendant promised that it was sound and free from vice," and it was objected in arrest of judgment that the precedent executed consideration was insufficient to support the subsequent promise, and we are of opinion that the objection must prevail.

(a) Cro. Jac. 630.

(b) 5 M. & W. 241.

(c) 1 B. & Ad. 950.

(d) 1 M. & Gr. 166.

(e) 11 Ad. & E. 438; S. C. 3 P. & D. 276.

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It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration.

In the present case, the only promise that would result from the consideration as stated, and be co-extensive with it, would be to deliver the horse upon request; the precedent sale without a warranty, although at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore that the consideration stated would not raise an *implied* promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, *express*, and the question is whether that fact will warrant the extension of the promise beyond that which would be implied by law, and whether the consideration, though insufficient to raise an *implied* promise, will nevertheless support an *express* one; and we think that it will not.

The cases in which it has been held, that under certain circumstances a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall v. Adney* (a), and in the case of *Eastwood v. Kenyon* (b). They are cases of voidable contracts subsequently ratified, of debts barred by operation of law subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from and indeed inapplicable to the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.

(a) 3 Bos. & Pul. 249. (b) 11 Ad. & El. 438; S. C. 3 P. & D. 276.

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Monday  
May 9th.

## KING v. BIRCH.

*PLATT*, on a former day in this term, obtained a rule calling upon the assignees of the defendant, a bankrupt, to shew cause why an order of Lord *Denman* C. J., for setting aside the fieri facias and all subsequent proceedings in this case, should not be rescinded.

This was an action of debt; the declaration contained several counts, and the aggregate amount of the sums demanded was 795*l*. The defendant did not plead to the action, and on the 28th February last the plaintiff became entitled to final judgment and signed it in the usual manner in the master's book. The judgment so signed in the master's book was for the whole sum of 795*l*. On the same day the plaintiff sued out a writ of fi. fa. for 2145*l*. 12*s*., being the amount of the debt really due, and 7*l*. 15*s*. costs.

On the 1st of March the sheriff levied, and on the 9th of March and the two following days proceeded to sell by auction. On the 7th of March a fiat in bankruptcy issued against the defendant, under which she was declared bankrupt.

On the 15th of March a summons was taken out to set aside the fi. fa. and all proceedings thereon for irregularity, on the ground that there was no judgment to warrant the writ, as the writ did not correspond with the judgment paper before mentioned, the writ being for 2145*l*. 12*s*., and the judgment being for 759*l*. On the 17th of March the judgment roll was carried in. On the judgment roll it appeared that judgment had been taken for the same sum as mentioned in the fi. fa., a remittitur having been entered as to the residue. The judgment roll, after reciting the declaration, proceeded thus, "and the said *E. A. Birch* in her proper person says nothing in bar or preclusion of the action of the said *W. H. King* whereby the said *E. A. Birch* remains undefended against the said *W. H. King*. And hereupon

The incipitur is not itself the judgment, but merely instructions for entering the judgment.

Where therefore, in the judgment roll, the sum stated to be recovered agrees with the sum for which the fi. fa. issues, the fi. fa. cannot be set aside, because it is for a less sum than is mentioned in the incipitur.

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the said *W. H. King* freely here in Court remits to the said *E. A. Birch* the sum of 5806*l.* 8*s.* parcel of the said sum of 7952*l.* in and by the declaration above mentioned and demanded, and all damages by him sustained on occasion of the detention thereof, and prays judgment for the sum of 2145*l.* 12*s.* residue of the said debt, together with his costs and charges by him about his suit in this behalf expended, to be adjudged to him. Therefore it is considered that the said *W. H. King* do recover against the said *E. A. Birch* the said sum of 2145*l.* 12*s.* residue, &c., and also 7*l.* 15*s.* for his damages," &c. "And let the said *E. A. Birch* be acquitted of the said sum of 5806*l.* 8*s.* parcel, &c., and the damages aforesaid, in form aforesaid remitted." The writ of *fi. fa.* commanded the sheriff to levy the 2145*l.* 12*s.* and the 7*l.* 15*s.* "which were adjudged to the said *W. H. King*, &c., whereof the said *E. A. Birch* is convicted *as appears to us of record*," &c. His lordship being of opinion that the writ of execution for one sum was not warranted by a judgment for another sum, which was the state of things before the judgment roll was carried in, and that the plaintiff had no right to cure the irregularity after the summons had been taken out to impeach it, made the order in question.

*Kelly* and *E. James* shewed cause. A writ of *fi. fa.* to levy a different sum from that mentioned in the judgment, even though it be a smaller sum than in the judgment, is irregular: *Webber v. Hutchins* (a). Where, as in the present case, the plaintiff is not entitled to the whole debt in the declaration mentioned, he may either enter a remittitur damna on the judgment paper as to the residue, and issue his writ for the sum due, or he may take judgment and issue a writ for the whole, and then indorse the writ for the sum due. Here at the time of issuing the *fi. fa.* for 2145*l.* there was no judgment to support it, for the incipitur in the master's book, which was the only judgment

in existence, was for a different sum. By Reg. Gen. of H. T. 4 *Will.* 4, rule 3, "all judgments whether interlocutory or final shall be entered of record of the day of the month and year, whether in term or vacation, when signed." So the time of "entering up judgment," referred to in 1 & 2 *Vict.* c. 110, s. 17, for the purpose of computing interest on judgments, is the time at which the incipitur is made in the master's book. No other judgment than the incipitur is ever drawn up, unless it becomes necessary for some ulterior purpose, for the incipitur alone is enough to issue execution upon. The incipitur therefore, being practically the judgment, ought to have agreed with the writ. The plaintiff had no right to amend his proceedings after they had been drawn in question, and, notwithstanding his attempt to cure his irregularity, there is now a variance between the judgment roll and the incipitur.

*Platt and Pashley* contra. The judgment roll is the only record of the sum recovered by the plaintiff, and when that roll is once carried in nothing else can be looked at. That record agrees with the writ, and cannot be contradicted. In *Dickenson v. Teague* (a), on the trial of an issue whether the cause of action arose within six years before the commencement of the suit, the plaintiff produced the roll on which the continuances appeared to have been regularly entered up. It appeared from the writs themselves that they had not been regularly continued, but it was held that the roll being right the Court would not look at any thing else to contradict it. The incipitur is nothing more than the leave of the Court by its officer to enter up judgment for the sum mentioned, or for any smaller sum; and the incipitur in debt is always entered for the aggregate amount of the sums in the different counts. So far from the incipitur being a judgment, it is not even evidence of a judgment: 2 *Tidd*, Pr. 943 (b); *Ayrey v. Devonport* (c); Bull. N. P. 228. At the time the

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(a) 1 C. M. &amp; R. 241.

(b) 9th ed.

(c) 2 New Rep. 474.

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order now in question was made the judgment roll was complete, and warranted the recital in the writ, which states that the plaintiff has recovered 2145*l.* 12*s.* against the defendant, "as appears to us of record." If there has been any irregularity in making the judgment roll vary from the incipitur, the proper course for the defendant would have been to apply to amend the roll so as to make it correspond with the incipitur.

LORD DENMAN C.J.—This argument has convinced me that my order for setting aside the fieri facias in this case must be rescinded. The incipitur is merely a warrant to enter judgment for the sum there stated, and not for more. I am always unwilling to vary the state of things subsisting at the time when a step was taken to question the validity of a proceeding with reference to them, so as to alter the situation of parties, and I acted on that principle in making this order. But as the incipitur is no record, and is only in the nature of instructions or a warrant for a future judgment of record, and the judgment roll, agreeing with the fieri facias, had been carried in before the summons was disposed of, there was no variance between the writ and record, so as to justify the order in question.

PATTESON J.—The application to set aside the execution was made on the ground that it varied from the judgment, and, if it did so vary, the order is right. The question now is, what is the judgment? I always thought that for the purposes of the same Court whose judgment it is the incipitur itself was the judgment, though it is otherwise in a different Court, and I do not understand the practice to be, as stated, to put the aggregate amount of all the counts in debt as the sum in the incipitur, and that it is only on the judgment roll it is usual to put the sum really due. I think the incipitur ought to be for the same sum which is stated in the judgment roll. In cases of debt on bonds it is different; there the judgment is for

the penalty, and so is the writ; and it is only in the levy that the execution creditor confines himself to the sum really due. In ordinary cases, where a party wishes to have execution for a less sum than he has recovered, he may issue a writ for the whole, and indorse it for the smaller sum, or, as was done in this case, he may enter a remittitur damna on the judgment. The judgment roll in this case does not vary from the writ; and I think the variance between the writ and incipitur was not a ground for setting the writ aside. At the same time I think the incipitur should be for the sum really due.

WILLIAMS J. concurred.

WIGHTMAN J.—The question arises on a variance between the writ and the incipitur. The variance is that the writ states a smaller sum than the incipitur. But the judgment of record, which is the only judgment recited in the writ, is in exact accordance with the writ. Whether the judgment, after it had been entered on the roll, might have been set aside for a variance from the incipitur, is another matter, not before the Court; the question is put entirely as between the writ and the incipitur. It is very true that in practice the incipitur is usually the only judgment entered, and that it is only where the record is required for some ulterior purpose that the judgment roll is carried in. Still the incipitur is not the judgment, and the party wishing to take advantage of a variance between the judgment and the writ should have the judgment roll carried in, and then, if the variance is continued on the roll, he may avail himself of the objection. Here the variance was not continued on the roll, and the objection fails.

Rule absolute.

D.

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*Saturday,  
May 7th.*

The QUEEN v. ROWED and another.

Indictment against two persons, charging that they, being persons of wicked and unnatural dispositions, did, in a certain open and public place, unlawfully meet together, with the intent of committing with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly and indecently, did commit with each other, in the sight and view of divers of the liege subjects, &c. in the said public place there passing, divers such practices as aforesaid, to the great scandal and disgrace of mankind, in contempt, &c. Held bad, in arrest of judgment, for want of certainty.

**INDICTMENT.** The first count stated that defendants, being persons of nasty, wicked, filthy, lewd, beastly, and unnatural dispositions, and wholly lost to all sense of decency and good manners, heretofore, to wit, on the 13th day of August, &c., with force and arms, at, &c., in a certain open and public place there, called Kensington Gardens, frequented by divers of the liege subjects, &c., unlawfully and wickedly did meet together for the purpose and with the intent of committing and perpetrating with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices; and then and there unlawfully, wickedly, openly, lewdly and indecently, did commit and perpetrate with each other, in the sight and view of divers of the liege subjects, &c. in the said public place there passing and being, divers such practices as aforesaid, to the great scandal and disgrace of mankind, in contempt, &c., to the evil example, &c., and against the peace, &c.

There were three other counts, which were the same in substance with the first.

One of the defendants having been tried and found guilty before Lord *Denman* C. J. and a special jury, at the Middlesex sittings after last Hilary term,

*Thesiger* now moved in arrest of judgment (a), on the ground that the indictment did not lay the charge with sufficient certainty. The acts imputed by this record are so vaguely indicated, as to convey no clear information to the defendants of the particular acts alleged against them, and thereby to put them to great difficulty either in preparing

(a) The objection to the indictment was made at the trial, and it was agreed that the case should be considered in banc as if the

objection had been made before verdict. But the question was finally treated as if raised after verdict and in arrest of judgment.

their defence or in supporting a plea of autrefois acquit. It is said in 4 *Bac. Abr.* Indictment (G) (citing *Cro. Eliz.* 147, 201; *Hawk. P. C.* bk. 2, c. 25, s. 57), "it is laid down a good general rule, that in indictments, as well as in appeals, the special matter of the whole fact ought to be set forth with such certainty, that it may judicially appear to the Court that the indictors have not gone upon insufficient premises." And further on it is said, "also an indictment accusing a man in general terms, without ascertaining the particular fact laid to his charge, is insufficient; for no one can know what defence to make to a charge which is uncertain; nor can he plead it in bar or abatement of a subsequent prosecution; neither can it appear that the facts given in evidence against a defendant on such a general accusation are the same of which the indictors have accused him; nor can it judicially appear to the court what punishment is proper for an offence so loosely expressed." Indecent public exposure of person, and assaults with intent to commit unnatural offences, are specific offences known to the law. Here, it is true, the indictment alleges that the parties committed indecent practices in the public view. But it is not stated what those practices were with sufficient preciseness to enable the defendants to know whether they constitute any offence known to the law. The indictment therefore did not afford them the opportunity of knowing with certainty whether they should plead or demur to it. There are but few exceptions to the rule that the facts and circumstances, which are the ingredients of an offence, must be alleged with certainty. Those exceptions are indictments for being a common barretor or scold, or keeping a common gambling or bawdy house; and the reason of the exception is, that, as the offence consists in the frequent and habitual commission of certain acts, the individual acts of which the offence is made up cannot be enumerated conveniently.

A rule nisi having been granted,

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*Clarkson* was then heard in support of the rule. He cited *Rex v. Biers* (a), *Rex v. Gill* (b), *Rex v. Munoz* (c), and *Rex v. Richardson* (d).

Sir F. Pollock A. G., Sir W. W. Follett S. G., and *Bodkin* shewed cause. The indictment is sufficiently certain within the rule laid down in *Rex v. Horne* (e), where it is said, "The charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty,' upon the premises delivered to them; and that the court may see such a definite crime that they may apply the punishment which the law prescribes." It is impossible for the court or jury not to see upon this indictment that a misdemeanour at common law is charged. The prosecutor may take any one of the words descriptive of the practices charged, and, if any one word is sufficient, the indictment may be sustained after verdict. The phrase "sodomitical practices" must signify, at the least, practices tending to sodomy, and therefore clearly describes an offence known to the law, and punishable as a misdemeanour. The mere solicitation of another to commit a crime is indictable: *Rex v. Higgins* (f), *Reg. v. Collingwood* (g), *Reg. v. Daniell* (h), *Rex v. Vaughan* (i), *Rex v. Scofield* (k). The offence is sufficiently specified. "There are many instances in which, though the crime rest in *tendency* only, it may be described by general words, without specifying the means: this happens when the offence is a conclusion of fact, arising from a variety of circumstances incapable of any precise definition. These therefore are to be regarded

- (a) 1 A. & E. 327; S. C. 3 N. & M. 475.  
(b) 2 B. & Ald. 204.  
(c) 2 Str. 1127.  
(d) 1 M. & Rob. 402.  
(e) Cowp. 682.

- (f) 2 East, 5.  
(g) 6 Mod. 288.  
(h) 6 Mod. 99.  
(i) 4 Burr. 2494.  
(k) Cald. 397.

as exceptions to the general rule from the necessity of the case:" 1 *Stark. Crim. Pl.* 144. Again, p. 146, it is said, "With respect to the description of the solicitation or endeavour, it seems that general words are sufficient, because the endeavour, attempt or solicitation is in general made up of petty circumstances, which cannot be set out on the record." There is an offence charged by this indictment in general terms, it is true, but still in terms of known legal signification; and it was for the jury to say whether the individual acts proved did or did not fall within the general description. The form of this indictment is taken from 2 *Chit. Crim. Law*, 69 (a); it is given there as a form of commitment, but the same certainty is necessary to a commitment as an indictment. There is also in 4 *Chit. Crim. Law*, 48, an indictment against the proprietor of a gallery, called "The Metamorphic Gallery," for keeping a room for the purpose of exhibiting indecent prints. Will it be said the form of indictment in that case was bad, because it did not describe the several prints? If the word "sodomy" itself had been used, it would not have conveyed more certain information than the phrase employed. No difficulty to the defendants could arise hereafter in support of a plea of autrefois acquit, for the identity of the act charged on the second indictment must in all cases be averred in the plea, and proved at the trial. [*Patteson J.* Would an indictment be sufficient which charged divers treasonable or fraudulent practices?] Probably not, for such practices may admit of infinite variety. *Peck v. Reg.* (b) is an instance of an indictment being held bad for not stating the particulars of the fraud alleged. The cases cited were cases of substantial uncertainty. In *Rex v. Richardson* (c) the indictment was for a conspiracy to cheat and defraud a person of the fruits of a verdict and certificate, obtained by him in an action of trespass. In such a case and in other cases cited, it would be difficult to conjecture by what particular mode the end

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(a) 2nd edit.

(c) 1 M. &amp; Rob. 402.

(b) 1 P. &amp; D. 508.

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was to be compassed ; nor was it necessary that any illegal acts should be resorted to for the purpose contemplated.

*Thesiger* in reply. Although the substantive, if used in this indictment, would have a certain legal meaning, the adjective has none ; nor would it do to allege practices tending to the crime referred to, for that would be as vague as the present charge. The practices charged do not appear to amount to that crime, nor to a solicitation to commit it, nor to exposure of person ; and there is no other crime of the same nature known to the law. The argument for the prosecution would go to shew that, because the obtaining money by false pretences is an offence known to the law, therefore the particular false pretences need not be shewn on the indictment ; yet the contrary has been held, and judgment has been reversed for the defect : *Rex v. Mason* (a).

LORD DENMAN C. J.—If there had been a long course of precedents to justify this form of indictment, we might hold it sufficient. But no authority for such a form has been cited. The indictment is too general ; it states that the accused parties met together for the purpose of committing certain practices, and that they did commit them ; the particular acts done are not alleged with proper certainty.

PATTESON J.—I cannot distinguish this indictment from an indictment alleging treasonable, fraudulent or any other practices. The indictment does not state what particular act was done. I cannot think this sufficient to inform the accused what it is they are charged with having done. The indictment may have a certainty in common parlance, but it wants legal certainty. In a legal sense it is by no means clear what acts are charged. A long course of precedents might be some argument in favour of such an indictment ; but we do not find any such precedents.

**WILLIAMS J.**—The latter part of this indictment has been relied upon by the prosecutor, for the preceding part of it rests in intent only, and no act illustrative of the intent is alleged. The question comes to this, whether the words used in the latter part of the indictment imply so specific and distinct an offence that the indictment can be sustained. I think they do not, and therefore it is insufficient.

D.

Judgment arrested.

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The QUEEN v. The Inhabitants of ROTHERHAM (a).

**A WRIT** of certiorari (b) had issued to bring up to this Court from the Court of Quarter Sessions of the West Riding of Yorkshire, the proceedings of the sessions upon the hearing and determination of an appeal against a certain order of two justices, for the removal of paupers from the township of Sheffield to the township of Rotherham. It specifically required the return of the order of removal, the examination on which it was founded, and the notice and grounds of appeal.

The examination was taken on the same day on which

(a) Decided at the sittings after Michaelmas term, Dec 3, 1842.

(b) It will be seen by the next case, that this Court considered the writ to have improvidently issued. A rule nisi for the writ was obtained in the Bail Court, counsel

appeared to shew cause in the full Court, but it appearing that office copies had not been taken of the affidavits on which the rule was granted, it was made absolute without argument.

*Held*, on an order of removal and examination, being brought before this Court on a return to a writ of certiorari, that the order sufficiently shewed the jurisdiction of the justices by stating a complaint by the churchwardens and overseers of, &c. that the paupers have come to inhabit in and are chargeable, &c., and that

upon examination of the premises taken before us, "we do adjudge the same to be true, and that the paupers are settled in," &c.

It is not necessary, where an order is made on complaint of, and is addressed to, officers of a township, that it should be stated that the township is one which maintains its own poor.

An order of removal may be absolute, without reference to the provisions of the stat. 4 & 5 Will. 4, c. 76, s. 79.

An examination which states that it was taken at S., that the mother is of S., and that she and her three children, of the ages respectively of seven, three years, and one year, were poor and chargeable to S., sufficiently shews that they were inhabiting in S., so as to give the justices jurisdiction to remove them.

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the order was made, before the same two justices who made the order.

The documents returned to the writ were as follows :—

*Order of Removal.*

“ West Riding of } To the churchwardens and overseers  
Yorkshire. } of the poor of the township of Sheffield,  
and to the churchwardens and overseers of the poor of the  
township of Rotherham.

“ Whereas complaint hath this day been made unto us, two of her Majesty's justices of the peace in and for the said West Riding (one being of the quorum), by the churchwardens and overseers of the poor of Sheffield aforesaid, that *Mary Varley* and her three children, viz. *Thomas*, aged seven years, *Jemima*, aged three years, and *James*, aged one year, have come to inhabit in the said township of Sheffield, not having gained a legal settlement there, nor produced any certificate owning them to be settled elsewhere; and that the said *Mary Varley* and her said three children are now actually become chargeable to the township of Sheffield: We do therefore, upon due examination of the premises, taken before us upon oath, adjudge the same to be true, and we do likewise adjudge the last place of the lawful settlement of the said *Mary Varley* and her said three children to be in the said parish, township or place of Rotherham. These are therefore in her Majesty's name to require you the said churchwardens and overseers of the poor of the township of Sheffield, or some or one of you, to convey the said *Mary Varley* and her said three children from and out of the township of Sheffield aforesaid to the parish, township or place of Rotherham aforesaid, and them to deliver to the churchwardens and overseers of the poor there, or to some or one of them, together with this order, or a true copy thereof, who are hereby required to take care and provide for them as the law directs.”

“ Examination. The examination of *Mary Varley*, of the township of Sheffield, in the said riding, widow, taken upon oath before us, two of her Majesty's justices of the

peace for the said riding, the 3d day of September, 1841, concerning her settlement," stated that she was about forty years of age, and to the best of her knowledge and belief was born in the township of Rotherham. "That about sixteen years ago, she being then a single woman, *Mary Beely*, took a house in Jesus Gate, Rotherham, belonging to Mr. *Taylor*, at 6*l.* a year rent, and in about nine months she married *George Blocksage*, who came to live in the house she had taken; he only lived about a year, and examinant continued on the same premises and paid the rent half-yearly. In about seven months after, she married again to *James Varley*, who went to reside on the same premises, and we stopped there about four months after we were married. The said *James Varley* died in July last, having acquired no settlement subsequent to the occupation at Rotherham, above described, and examinant and three children by the said *James Varley*, viz. *Thomas*, aged seven years, *Jemima*, aged three years, and *James*, aged one year, are poor and chargeable to Sheffield."

"Notice and grounds of appeal. To the churchwardens and overseers of the poor of the township of Sheffield.—This is to give notice to you and every of you, that we the churchwardens and overseers of the poor of the township of Rotherham, in the West Riding of the county of York, do intend, at the next general quarter sessions of the peace, to be holden by adjournment at Sheffield, in and for the said riding, on the 25th day of this present month of October, to enter and prosecute an appeal against an order of, &c., two of her Majesty's justices of the peace, acting in and for the said West Riding, for and concerning the removal of *Mary Varley*, widow, and her three children, *Thomas*, *Jemima*, and *James*, to our said township of Rotherham.

"And take notice that the grounds of our appeal are—

"1st. That the said *Mary Varley* is not legally settled in the said township of Rotherham.

"2d. That the said *Mary Varley* did not, when a single woman, take a house in Jesus Gate, Rotherham, belonging

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to Mr. *Taylor*, at 6*l.* a year rent, as in the examination of the said *Mary Varley* is stated, nor did she at any time occupy such house in the township of Rotherham aforesaid.

" 3d. That it does not sufficiently appear by the examination of the said *Mary Varley*, whereupon alone the said order of removal was made, at what time the said *Mary Varley* became legally settled in the said township of Rotherham.

" 4th. That it does not sufficiently appear by the examination of the said *Mary Varley*, in what manner the said *Mary Varley* became legally settled in the said township, or that she is legally settled there.

" 5th. That it does not appear by the said examination in what union, parish, township or place the said *Mary Varley* and her said three children, or any of them, were inhabiting at the time of the making of the said order of removal.

" 6th. That the said examination contains no evidence whatever of any complaint having been made before the said justices, by the said churchwardens and overseers of the said township of Sheffield, of the said *Mary Varley* having come to inhabit in the said township of Sheffield, as in the said order of removal is alleged.

" 7th. That the said order of removal is bad, and that the said examination, whereupon the same was made, is defective and insufficient to support the same."

The following were the points for argument delivered with the paper books, and relied on in support of the rule for quashing the orders:

1st. That the order of removal does not shew a complaint made by either churchwardens and overseers of a parish, or by overseers of a township, separately maintaining its own poor.

2d. That the order shews the necessary examination by the justices only into the inhabitancy and chargeability of the paupers in and to Sheffield, and does not shew any examination whatever into the settlement in Rotherham,

the adjudication as to which is preceded by nothing to warrant the same.

3d. That the said order absolutely and unconditionally requires the churchwardens and overseers of the poor of the said township of Sheffield to convey the paupers to the township of Rotherham, and them deliver to the churchwardens or overseers of the poor there, who are by the said order required to provide for the said paupers, and is therefore bad and inoperative, as contravening the express provisions of the stat. 4 & 5 Will. 4, c. 76, s. 79.

4th. That from the examination, whereupon the order of removal was made, it appears that the removing justices acted without jurisdiction, inasmuch as that examination contains no evidence whatever that the paupers were severally residing in the township of Sheffield, where the said examination was taken.

5th. That the same want of jurisdiction also appears in this, that the said examination contains no evidence whatever that any complaint was made by the churchwardens and overseers of the township of Sheffield to the said justices, as alleged in their said order, respecting the inhabitancy and chargeability of the paupers in and to the township of Sheffield.

6th. That the said examination, whereon, &c. contains no evidence of a settlement of the paupers in the said township of Rotherham.

*Pickering* in support of the order of sessions (a). The first objection made is against the order, that it does not shew it was made on complaint of parties authorised by law to ask for it, that is to say, by churchwardens and overseers of a parish, or of a township maintaining its own poor. It states the order to have been made on the complaint of the churchwardens and overseers of the poor of Sheffield, but it is said it ought to have stated that that town-

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(a) On Saturday, Nov. 12, 1842, before Lord Denman C. J., *Williams, Coleridge and Wightman Js.*

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ship maintains its own poor. Intendment must be made in favour of the order that it was such a township. If this is erroneously stated, it might be amended by the sessions, and this Court will not hold it a matter of substance on an objection taken in this mode; *Rex v. Amlwch* (a), *Rex v. Topsham* (b), *Rex v. Bingley* (c). Indeed it may be contended that, in the counties named in the stat. 13 & 14 Car. 2, c. 12, s. 21, one of which is Yorkshire, the separate townships, by the operation of that statute, must support their own poor.

The second ground of objection is, that the order does not shew any inquiry into the settlement of the paupers in Rotherham, and that therefore the adjudication of their settlement there rests without any foundation. Though that question is not alluded to in the early part of the order, so that it may not be intended in the "premises," still it is afterwards distinctly stated to have been adjudicated upon as a distinct subject of inquiry; and, as the jurisdiction of the justices is admitted, it must be presumed that the adjudication set forth was supported by sufficient evidence, and that such evidence was taken on oath.

The third ground of objection is, that the order to remove is unconditional; whereas, it is said, it ought to shew that none of the excepted cases in which, by the stat. 4 & 5 Will. 4, c. 76, s. 79, a removal is suspended, have occurred, or rather that it ought on the face of it to be conditional on their non-occurrence. But it is not necessary that the order should refer to the possibility of a case arising in which it must be suspended. The order is good, though there may be afterwards reasons why it should not at once be executed.

The fourth, fifth and sixth grounds of objection taken go to the merits, and question the sufficiency of the evidence before the justices to warrant their adjudication; but, as the sessions have granted no case, this Court will not

(a) 4 B. & C. 757; S. C. 6 D.  
 & R. 626.

(c) 4 B. & Ad. 567; S. C. 2 N.  
 & M. 103.

(b) 7 East, 466.

look at anything but the order itself. *Reg. v. Abergele* (a),  
*Reg. v. Cheshire* (b), *Rex v. Frieston* (c), *Reg. v. Bolton* (d).

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*Pashley* contra. The proceedings ought to shew on the face of them the jurisdiction of the justices who made the order: *Inter Inhab. Chittinston and Penshurst* (e), *Kite and Lane's case* (f), *Rex v. All Saints, Southampton* (g), *Rex v. North Riding of Yorkshire* (h), *Rex v. Justices of Warwickshire* (i), *Reg. v. Colbeck* (k). It ought to appear that the township, of which the complainants were officers, maintained its own poor: *Rex v. Bramshaw* (l). The order ought to adjudicate that the complainants were overseers of such a township: *Day v. King* (m). The order ought to state the evidence was taken on oath. [*Per Curiam*. That does appear.]

The order to remove ought not to be absolute and unconditional. [*Coleridge J.* Your objection is that the order should embody the whole of the proviso. Lord Denman C.J. That is to say, that the order to remove should, under certain circumstances, be an order not to remove.]

Finally, the last three objections are that it does not appear upon the examination that there was any evidence of the pauper's being inhabitant and chargeable in Sheffield; therefore it does not appear that the justices having jurisdiction in Sheffield had any over this particular case. [*Coleridge J.* You seek to make the jurisdiction depend on the truth of the complaint, and not on the fact of there

(a) 8 A. & E. 394; S. C. 3 N. & P. 406.

(b) 8 A. & E. 398; S. C. 1 P. & D. 88.

(c) 5 B. & Ad. 597.

(d) 1 Q. B. 66; S. C. 4 P. & D. 679.

(e) 2 Salk. 473.

(f) 1 B. & C. 101; S. C. 2 D. & R. 212.

(g) 7 B. & C. 785; S. C. 1 M. & R. 663.

(h) 6 A. & E. 863; S. C. 2 N. & P. 103.

(i) 6 A. & E. 873; S. C. 2 N. & P. 153.

(k) 12 A. & E. 161; S. C. 3 P. & D. 488.

(l) Burr. Sett. Cases, 98.

(m) 5 A. & E. 359; S. C. 6 N. & M. 845.

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being a complaint. The Chief Justice, in delivering the judgment of the Court in *Cave v. Mountain* (a), said, "If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts."]

*Cur. adv. vult.*

Lord DENMAN C. J. (Dec. 3rd) delivered the judgment of the Court.—This case comes before us upon a return to a writ of certiorari, whereby the Court of Quarter Sessions was commanded to return their order, confirming the original order of two justices, for the removal of certain paupers to the appellant township, *and also* the examination whereupon that original order was made, and the notice of appeal to the sessions, upon which nothing turns.

The objections founded upon that return consisted of two parts; first, that the original order of removal was defective upon the face of it, for want of shewing jurisdiction in the removing justices; and, next, that the examination whereon they proceeded was defective in not shewing that the paupers were at the time in the township, and that therefore they had no jurisdiction to remove.

Upon the first point (the form of the original order), the Court gave sufficient answers to the various objections which were urged in the course of the argument, which we do not consider it necessary to repeat. We then thought, and think still, that the original order is unobjectionable. We shall now only add that we certainly should not be induced, upon slight grounds, to overturn a form of proceeding which we have reason to believe has been established by the usage of very near a century.

One objection only was felt as creating any difficulty, and it was this; that it does not appear upon the face of

(a) 1 M. & Gr. 257; S. C. 1 Scott, N. R. 132.

the examination by the removing justices that the paupers, at the time of the removal, were residing in the township, and that therefore there was no jurisdiction to remove. This objection involves consequences more extensive perhaps than may at first sight appear, as to the jurisdiction of the Court of Quarter Sessions and as to the matters into which this Court will inquire, where they (the sessions) have undoubted jurisdiction over the subject brought under our consideration. It raises two questions of some importance; first, whether the writ of certiorari itself did not issue improvidently, so far as it required the return of the original examination and of the notice of appeal, the same forming a portion of the evidence submitted to the sessions upon the hearing of the appeal; and next, whether, although returned, this Court ought to go further than to examine the validity of the original order and of the order of justices, without examining the evidence upon which they proceeded in a matter obviously within their ordinary jurisdiction, and where no case has been stated for our opinion as to the admissibility or effect of that evidence or any part of it.

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Into these questions however we do not feel it necessary to enter, because, giving full effect to the objection and judging the examination as by that objection we were called upon to do, we think it sufficient.

The point for consideration is, whether, upon the face of the examination, by fair and reasonable intendment (and by that rule we were desired to consider it), it does not sufficiently appear that the paupers were inhabiting in the removing township at the time of the examination and of making the order.

And first, with respect to the mother. She is stated to be "of Sheffield," and her examination is taken by the removing justices "at Sheffield." Moreover, she and the other paupers are stated to be "chargeable to Sheffield." Now this statement of being chargeable we find to have been considered by this Court as material upon this very

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point of inhabitancy. In the case of *Rex v. Binigar* (a) it was stated in the order of removal "that the paupers *lately came* and intruded themselves into the parish, endeavouring there to settle as inhabitants thereof;" and the objection to the order was, that the complaint did not state that the paupers "*then were*" but "*lately came*," and so that the justices had no jurisdiction. To this it was answered by the Court, "The order states, and the justices adjudge it to be true, that the paupers are *likely to become chargeable* to the parish, which could not be *if they were not in the parish at the time*." And there is certainly no ground for presuming any change of circumstances, as the examination and order are by the same justices, and bear date on the same day, the 3rd of September. From these circumstances taken together, we think it sufficiently appears that the mother was *then* in the township of Sheffield.

Then, as to the children. The helpless infancy of the two younger (three years and one year of age) raises a presumption of law and common sense that they would be with the mother for custody and protection, and the more so in this instance, as from the examination we find that their father was then dead. As to the eldest (seven), though the inference may not be so strong, he is nevertheless of an age up to which the period of nurture is considered as extending. This therefore, with the weight which we have seen attributed to the statement of chargeability, will, we think, suffice as to him.

The rule must therefore be discharged.

G.

Rule discharged (b).

(a) 7 East, 377.

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(b) See the next case, and *Reg. post*, 560.



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**PASHLEY** (b) moved for a rule, calling upon the justices of the West Riding of Yorkshire to shew cause why a certiorari should not issue to bring up to this Court an order of two justices for the removal of certain paupers, the examination on which it was founded, and the proceedings in the Court of Quarter Sessions, upon an appeal against the said order, including the order and examination aforesaid, and the notice and grounds of appeal. The object of the notice was to get the order before the Court in order to quash it for an insufficiency of evidence, apparent on the face of the examination. The Court of Quarter Sessions, on the hearing of the appeal, had refused to grant a case on the objection, which was overruled. The cases he cited in support of his motion are commented on in the judgment.

Where the Court of Quarter Sessions have heard and determined an appeal against an order of removal, and refused to grant a case for the opinion of this Court on an objection to the sufficiency of the examination, this Court will not grant a certiorari to bring up the examination, and the notice and grounds of appeal, for they are no part of the record of the sessions.

*Cur. adv. vult.*

Lord DENMAN C. J. delivered the judgment of the Court.—One of the questions, which in the case just disposed of we observed to be involved in the discussion, has now come before us; and it is this, whether the writ of certiorari ought to require any thing more to be returned than the record of the Court of Quarter Sessions, thereby meaning the original order of removal and the proceedings of the sessions thereon upon the hearing of the appeal. In the present instance the application is to require the return of that record, *and also* of the examination, whereupon the original order of removal was made.

In the first place we find, upon reference to the officers of the Crown Office, that there is no memory nor any note to be found of any certiorari (except where a case has been

(a) Decided at the sittings after Michaelmas term, Dec. 3, 1842.

(b) Wednesday, Nov. 23, before Lord Denman C. J., Williams and Coleridge Js.



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granted by the sessions) having issued, requiring the return of any such additional matter. The case just disposed of is of course an exception, and the writ is considered as having issued improvidently, so far as respects the direction to return such additional matter as is therein specified.

The cases cited in support of the present application are entirely foreign to the purpose. In all of them, without exception, a case appears to have been granted by the sessions, and so to have been brought before this Court. In the case of *Rex v. Tedford* (a), it appears that a case was stated by the Court of Quarter Sessions. In *Rex v. Margam* (b) a case also appears to have been stated, and this Court (though not precisely in the usual form) in substance ordered that case to be restated. In *Rex v. Whittlebury* (c) a case had been granted by the sessions, and the remarks of Lord *Kenyon*, which were much pressed upon us regarded the facts stated in that case, and are utterly without application to the present. *Rex v. Wishford* (d) (the latest authority cited) was also the common case of an order of sessions upon a case reserved.

Nothing therefore has been adduced to shew that we ought to do what is now required. But on the contrary we find that an understanding seems to have prevailed in direct opposition to it. In the case of *Rex v. Oulton* (e) we find the following remarks in the judgment of Mr. Justice *Probyn*: "This Court can take no notice of any thing but the order. I remember a case where the examinations were returned with the order, but the Court said they could take notice of nothing out of the body of the order."

Upon the whole we consider this to be a speculative novelty, without the warrant of any principle, precedent or authority, and that therefore there must be no rule.

G.

Rule refused (f).

(a) Burr. Sett. Cases, 57.

&amp; M. 540.

(b) 1 Term R. 775.

(c) Burr. Sett. Cases, 64.

(c) 6 Term R. 466.

(f) See *Reg. v. The Justices of*

(d) 4 A. &amp; E. 216; S.C. 5 N.

*Buckinghamshire*, post, 560.

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## The QUEEN v. The Inhabitants of STONELEIGH (a).

ON an appeal to the Quarter Sessions of Warwickshire, against an order made by two justices for the removal of *Thomas Heritage*, his wife and four children, from the parish of Kenilworth to the parish of Stoneleigh, both in Warwickshire, the sessions confirmed the order, subject to a case. The examination on which the order was made was as follows:

*Thomas Heritage* saith, "I am about the age of thirty-six years, and was born, as I have been informed and believe, in a farm house belonging to Mr. *Boulbee*, near his house at Springfield, but in what parish I do not know; on Kenilworth Statute-day, about eighteen or nineteen years ago, I was hired by Mr. *Wm. Cattell*, Mrs. *Whitmore's* bailiff, in my father's garden, at Kenilworth, to serve the said Mrs. *Whitmore*, who lived at Wainbody Wood, in the parish of Stoneleigh, for twelve months, as cow boy, at the wages of 50s. certain, and 5s. to be left to Mrs. *Whitmore*. Mr. *Cattell* asked me to come as soon as I could, as they were busy at Michaelmas, and I said I would go on Warwick Mop-day, which was held on the 12th of October. I did go on that day, and I served the said Mrs. *Whitmore* in the said parish of Stoneleigh, from that time to the 12th October following, when I received my wages and left."

An examination, in stating a settlement by hiring and service, stated that the pauper went to and served in the appellant parish for a year, as cow boy, at the wages of 50s.: the sessions, subject to the opinion of this Court, found that residence sufficiently appeared:—*Held*, that it did not.

The material ground of appeal was, that the said examination of the pauper *T. Heritage*, on which the said order of removal is grounded, is defective and insufficient, because it discloses no legal settlement, or legal evidence of any settlement whatsoever, in the said parish of Stoneleigh, inasmuch as it does not state that the pauper resided or inhabited in the said parish of Stoneleigh, under or during the hiring therein alleged for forty days or any other period. The Court of Quarter Sessions, subject to the opinion of

(a) Decided in Hilary Term, 1843, Jan. 21.

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this Court, held that residence sufficiently appeared in the examination.

*Mellor and A. R. Adams* in support of the order of sessions. This case is clearly distinguishable from *Reg. v. The Justices of the West Riding (a)* and *Reg. v. The Inhabitants of Old Stratford (b)*, in both of which the objection was to the grounds of appeal; here it is to the examination, where less strictness is required: *Rex v. Kelvedon (c)*. The sessions have here found that residence sufficiently appears, and that is a reasonable inference from the facts stated in the examination. It is stated that the pauper went to and served in the parish of Stoneleigh, and that must raise a presumption that the pauper was to reside in his mistress's house in the respondent parish. [*Coleridge J.* It does not appear that the pauper was a menial servant. *Patteson J.* It is quite consistent with the examination, that the pauper never resided a single day in the parish of Stoneleigh. *Coleridge J.* It is part of the removing justices' duty to inquire where the pauper resided the last forty days of his service. They ought to see that they have before them the proper materials for making an order of removal.] Before the passing of the New Poor Law Act, 4 & 5 Will. 4, c. 76, the examinations were never sent to the appellant parish, consequently no objection was ever taken to them, but the appeal, when it came to be heard at the sessions, was decided by the evidence there adduced, without reference to what had been proved before the removing justices.

*Huyes and Gale* contrà, were not heard.

Lord DENMAN C. J.—The examination is bad. The Court is bound to see that both examinations and grounds of appeal in stating a settlement set out most distinctly all the requisites necessary to constitute it. I believe that the

(a) 1 G. & D. 706.

(b) 2 G. & D. 82.

(c) 5 A. & E. 667; S. C. 1 N.

& P. 138.

course this Court pursues, of requiring sufficient evidence of a settlement before a pauper is removed, will, in the end, be found to be productive of great benefits to parishes.

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PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

G.

Order of Sessions quashed.

The QUEEN v. The Inhabitants of SOWE (a).

ON appeal against an order of two justices of the borough of Warwick, for the removal of a pauper named *Friederick Benton*, his wife, and two children from the parish of St. Mary in the said borough, to the parish of Sowe in the county of Warwick, the order was confirmed, subject to the opinion of this Court upon a case.

It appeared upon the hearing of the appeal that the magistrates had admitted as evidence upon the present removal the order and examinations which had been taken by two justices on the removal of the wife of a brother of the present pauper, which order had been executed, and had not been appealed against. The order and examinations admitted were of the date of 1835, and were as follows:—

“ To the churchwardens and overseers of the poor of the parish of St. Mary, in the said borough of Warwick, and to the churchwardens and overseers of the poor of the parish of Sowe, in the said county of Warwick, &c. Upon the complaint of the churchwardens and overseers of the poor of the parish of St. Mary aforesaid, in the said borough of Warwick, unto us, that *Mary Benton*, the wife of *Samuel Benton* the younger, now confined in Warwick Bridewell for disobeying an order of bastardy, and her two children, viz. *Edwin*, aged about three years, and *Emma* about two years,

An examination, on which an order of removal was founded, stated a derivative settlement from the father of the pauper in the appellant parish, and that on a former occasion the pauper's brother's wife had been removed on an order founded on an examination stating the same derivative settlement from the father, on which order the appellant parish had, without appeal, received the said wife. On appeal these facts were received in evidence, to shew an admission by the appellant parish of the father's settle-

(a) Decided H. T. 1843, Saturday, Jan. 21.

ment:—*Held*, that they were properly admitted for that purpose.

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have come to inhabit in the said parish of St. Mary, not having gained a legal settlement there, nor produced any certificate owning themselves to be settled elsewhere, and that the said *Mary Benton* and her said two children are actually chargeable to the said parish of St. Mary, we, the said justices, upon due proof made thereof, as well upon the examination of the said *Samuel Benton* upon oath as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true, and we do likewise adjudge that the lawful settlement of them the said *Samuel Benton* and his said wife and children is in the said parish of Sowe, in the said county of Warwick. We do therefore require you the said churchwardens and overseers of the poor of the said parish of St. Mary, or some or one of you, to convey the said *Mary Benton* and her said two children from and out of your said parish of St. Mary to the said parish of Sowe, and them to deliver to the churchwardens and overseers of the poor there, or some or one of them, together with this our order, or a true copy thereof, and we hereby require you the said churchwardens and overseers of the poor of the said parish of Sowe to receive and provide for them as inhabitants of the said parish of Sowe.

The examination of *Samuel Benton* the younger, and *Samuel Benton* the elder, taken upon oath. The said *Samuel Benton* the younger, who is now confined in Warwick Bridewell for disobeying an order of bastardy, upon oath saith, that he is about the age of twenty-four years, and that he was born, as he hath been informed and verily believes, at Birmingham, where his father and mother then lived, but belonged to the parish of Sowe, in the county of Warwick. Examinant was married by banns at St. Mary's church, Warwick, in February, 1832, to Mary his present wife, by whom he has two children, viz. *Edwin* about three and *Emma* about two years old, that his said wife and children are now chargeable to the said parish of St. Mary.

And this deponent further saith, that he hath not by any ways or means done any act to obtain a settlement in any parish or place to the best of his knowledge or belief.

The said *Samuel Benton* the elder, upon oath says, that he was born, as he hath been informed and verily believes, at Coundon, near Coventry, where his father and mother then lived, but belonged to Keresley, near Coventry, that when examinant was about the age of thirteen he was hired by Mr. *Joseph Cator*, a farmer of Sowe, at Bulkington Statutes, about a fortnight or three weeks before Michaelmas, 1800, for a year, at the wages of 4*l.*, and received a 1*s.* earnest, that he went into and remained in Mr *Cator's* service the whole of his time and received his full wages and left at Michaelmas, 1801. That he was married by banns at St. Mary's church aforesaid to *Rebecca* his present wife, by whom he has had six children, viz. *Rebecca*, the said *Samuel Benton* the younger, *Frederick*, *Ann*, *Mary Jane*, and *George*, and has obtained no settlement since he left the said Mr. *Cator's* service to the best of his knowledge and belief."

The above documents were again produced and admitted on the appeal, and it was also proved that the paupers had been received without appeal by the parish officers of Sowe.

The statement of the grounds of appeal, so far as it is necessary for the purpose of this case to set forth the same, were as follows:—That the order of removal in this case is bad and inoperative. First, because the examinations on which it is grounded are insufficient and defective, and disclose no legal evidence to support the same. Secondly, because from the said examinations it appears that the family of one *Samuel Benton* the younger were in the year 1835 removed from the said parish of St. Mary to the said parish of Sowe, and such order and the examinations on which it was made were improperly admitted as evidence on the making of the said order in this case, inasmuch as it is not shewn or set forth in the said examinations

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in this case, that the pauper *Frederick Benton* derived his settlement from the said *Samuel Benton* the younger. Thirdly, because the said order for the removal of *Samuel Benton* the younger, and the examinations on which it is grounded were not legal evidence in this case, and ought not to have been admitted as evidence by the removing justices.

On the hearing of the appeal it was objected for the appellants that the order of removal of *Mary Benton*, the wife of *Samuel Benton* the younger, and her children, and the examinations on which the same was founded, were not admissible evidence before the removing justices of the settlement of the pauper *F. Benton* and his wife and children as against the appellants.

The recorder was of opinion that the said last mentioned order and examinations were legal and admissible evidence of the settlement of *Fred. Benton* and his wife and family in the appellant parish, and confirmed the order, subject to the opinion of the Court on this point.

*Mellor* and *A. R. Adams* in support of the order of sessions. This order and the examinations on which it was founded are admissible evidence on two grounds; firstly, as evidence of an admission by the parish officers of Sowe of all the facts contained in the examinations; secondly, as a judgment made by a court of competent authority, and therefore evidence of all matters necessarily involved therein, one of which was the settlement of the father of the then and present pauper, both of whom it was sought to charge the parish of Sowe with the maintenance of, by force of a derivative settlement from him (*a*).

The order and examination, on which the former removal was founded, were admissible as evidence, whatever the force of it might be, of an admission by the parish officers of Sowe of the matters therein stated. They were in effect the same as a statement made in the presence of the party

(*a*) The argument on this point Court wholly proceeded on the is omitted, as the judgment of the first point.

of the facts contained in them. The answer of a party to a statement is always admissible in evidence; and, to lay the foundation for the admission of the answer, the statement to which it is a reply must be proved. Evidence of the conduct or acts of the party to whom a statement is made, is admissible in the same way as an answer to it; and here the appellants, on this order and examination being served upon them, received the pauper without objection. [*Per Curiam*. The parish officers might then have received the pauper, knowing him to be settled in their parish on grounds different to those stated in the examination.] That may undoubtedly be so, and the parish officers of Sowe might have given evidence on the trial of this appeal that that was the reason of their reception of the former pauper. That might destroy the effect of the evidence, but does not shew that it was inadmissible. In *Doe d. Clarges v. Forster* (a) it was held that a notice to quit at Michaelmas, served personally on the tenant, who made no objection at the time, is *prima facie* evidence, from whence the jury may find that the tenancy commenced at that period. In *Heane v. Rogers* (b), *Bayley J.*, in delivering the judgment of the Court, said, "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him: but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not concluded or estopped by them."

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*Hayes* and *I. Spooner* contra. The evidence was inadmissible altogether. The parish officers were not agents to make admissions for the parish. [Lord *Denman C.J.* They do not put it on the other side that the admission was by an agent, but by a party.] In *Rex v. Woburn* (c) it was held that a rated inhabitant is to be considered a party to an appeal between his parish and another, but, even if that be so,

(a) 13 East, 405.

(c) 10 East, 395.

(b) 9 B. & C. 586; S. C. 4 M. & R. 486.



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there is here no admission by such an inhabitant. In 2 *Nolan's* P. L. 134 (*a*), it is said, "that an acknowledgment must, to affect the parish, be made by certain prescribed modes; for the parish officers have no power to settle a person in their parish by their acts or declarations. A parish may acknowledge a pauper to be settled with them in three ways: 1st, By relief: 2nd, By certificate: 3rd, By neglecting to appeal against an order of removal."

They also cited *Rex v. Southowram* (*b*).

Lord DENMAN C. J.—It is impossible to say that this evidence was not admissible. Whether it was or not is the only question submitted to us by the case.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

Order of Sessions confirmed.

(*a*) 4th ed. It is plain that the author is speaking of what acknowledgments are in themselves evidence of settlement, and not of what facts, tending to prove a settlement, it is competent to give evidence by proof of admission.

According to the doctrine contended for, pushed to the extreme, parish officers, on the trial of an appeal, could not dispense with proof of a fact or document by expressly admitting it.

(*b*) 1 T. R. 353.

G.

The QUEEN v. The Inhabitants of St. GILES (*c*).

An apprentice in the sea service, whose term of apprenticeship was running at the time of the passing of 4 & 5 Will. 4, c. 76, but who

UPON appeal against an order for the removal of a pauper from the parish of St. Giles, Middlesex, to the parish of St. Mary at Hill, in the city of London, the Court of Quarter Sessions quashed the order, subject to the opinion of the Court of Queen's Bench upon the following case:—

(*c*) Decided in Hil. Vac. 1843 (Feb. 1).

had previously served and resided so as to gain a settlement, retains his settlement, notwithstanding the 67th section, which enacts "that from and after the passing of this act no settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise, nor by any person now being such an apprentice, in respect of such apprenticeship."

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The pauper was duly bound by indenture of apprenticeship, bearing date on or about the month of August, 1831, to the sea service, for the term of seven years, and served his master and resided in the appellant parish as his apprentice, so as to have gained a settlement in that parish, before the passing of the 4 & 5 Will. 4, c. 76, but his apprenticeship had not expired when that statute came into operation.

The appellants contended that, inasmuch as the apprenticeship, and the service thereunder, was not ended at the time of the passing of the statute in question, no settlement could be acquired thereby, according to the provisions of the 67th section of that statute. The respondents contended, that the 67th section was prospective only, and did not divest the pauper of the settlement which he had acquired before the passing of that act.

If this Court shall be of opinion that the pauper acquired and retained a settlement in the appellant parish, notwithstanding the provisions of the statute, the order of sessions is to be quashed.

If the Court shall be of a contrary opinion, the order of sessions is to be confirmed.

*Adolphus* in support of the order of sessions. The 67th section of the Poor Law Act, 4 & 5 Will. 4, c. 76, provides, "That from and after the passing of this act, no settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas as a fisherman, or otherwise, nor by any person, *now being such an apprentice*, in respect of such apprenticeship." Although in this case there had been a forty days' service and residence under the apprenticeship, before the passing of the statute, yet, as the term of apprenticeship had not been completed at that time, the statute operates to bar his settlement. Before the statute as many settlements might be gained as there were forty nights in the period of the apprenticeship, and so the ultimate settlement to be ac-

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quired, by virtue of the apprenticeship was undetermined when the act passed. If the settlement in the appellant parish is allowed, the pauper "now being such an apprentice," will gain a settlement "in respect of such apprenticeship," which the act has said he shall not do. The latter part of the clause is made inoperative, if this settlement is allowed. He also referred to a note upon this section by Mr. *Archbold*, where it is said, "This and the case of settlement by estate are the only instances in which this act deprives a party of a settlement already gained."

*Bodkin* contra. The words "*shall* be acquired" are to be carried on to the latter part of the clause, so as to prevent persons "being apprentices" at the time of the passing of the act, as well as future apprentices, from *afterwards* acquiring settlements. By this construction effect is given to the whole section. (He was then stopped.).

LORD DENMAN C. J.—We think that is the true construction, and the argument is strengthened by reference to section 65, which contains retrospective words (*a*) that are omitted in the 67th section.

PATTESON and COLERIDGE Js. concurred.

Order of Sessions quashed.

(a) See *Res v. Rellenden*. 1 N. & P. 448, where the 65th section was so construed.

D.

END OF EASTER TERM.

1842.

## TRINITY TERM,

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA, 1842.

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The Judges who usually sat in Banc this Term were,

Lord DENMAN C. J.

WILLIAMS J.

PATTERSON J.

COLERIDGE J.

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In the Bail Court,  
WIGHTMAN J.

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SALLY CATTERAL v. KENYON and JANE his wife.

Wednesday,  
June 1st.

**TROVER** for the conversion of two cows. The declaration alleged that they came to the possession of the said *Jane* by finding, and that she converted them to the use of her husband. Pleas, 1. That the said *Jane* was not guilty: 2. That the plaintiff was not lawfully possessed as of her own property.

At the trial in the Court of Common Pleas at Lancaster, at the March Assizes, 1841, before *Rolfe* B., the principal question made was upon the sufficiency of the evidence of a conversion by the female defendant. The cows had been taken in execution on a *fi. fa.* against the goods of the father of the plaintiff. The bailiffs had left them in a building attached to and part of an inn in Blackburn, kept by the defendant. The defendant's wife was in the habit of taking a part in the management of his business. Several demands of the cows by the plaintiff from the female defendant were proved. In answer to the first two, she said she could not give them up, not knowing whether it would be right, she must inquire about it. In answer to the third demand, she said she had seen Mr. *Bell*, (the attorney for the plaintiff) would see her harmless, and that she would not give them up.—*Held*, in an action of trover against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her.

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tiff in the suit in which the fi. fa. issued), that he had told her, not to deliver them up, he would see her harmless, and that she need not bother herself anymore about it, and she would not deliver them. The learned judge reserved leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict. A rule having been obtained to enter a nonsuit according to the leave reserved,

*Tomlinson* in shewing cause took a preliminary objection, that all motions for new trials of cases tried in the Court of Common Pleas at Lancaster should be made in the Court of which the judge is who tried the cause. He cited a note to *Foster v. Jolly* (a) in which Lord *Denman* is reported to have said that the judges had come to a resolution to that effect.

Lord DENMAN C. J.—I think if the point had been mentioned, we should have said it was the more expedient course to move in the court of the baron who tried the cause, but it is not an objection now against this rule.

*Tomlinson* shewed cause against the rule to enter a nonsuit. There was sufficient evidence of a conversion by the female defendant. There can be no doubt that the third was a positive refusal to give up the cattle, and if given by a person sui juris would be evidence of a conversion. Taking the property of another from one who has no authority to dispose of it, and refusing to deliver it to the owner when demanded, is evidence of a conversion; *M'Combie v. Davis* (b), *Wilson v. Anderton* (c). Then what difference does it make that this evidence is the act of a feme covert. She is capable of a conversion: *Keyworth v. Hill et ux.* (d). She took a part in the management of her husband's business, and the refusal to deliver is evidence of a conversion by her.

(a) 2 C. M. & R. 703.

(b) 6 East, 438.

(c) 1 B. & Ad. 450.

(d) 3 B. & Ald. 685.

*W. H. Watson* in support of the rule. The custody of the wife was the custody of the husband, and her refusal was therefore the refusal of a person who had no means of giving up the property, and consequently no evidence of any conversion by her: *Alexander v. Southey* (a). To constitute a conversion, there must be a taking with intent to convert it to the use of the taker, or of a third person: *Fouldes v. Willoughby* (b). The refusal by the female defendant afforded no indication of such an intention.

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v.  
KENTON.

LORD DENMAN C. J.—This rule was granted on the authority of *Verral v. Robinson* (c). I think upon consideration that this case does not apply. The judges there considered the chattel, the subject of the action, to have been in the custody of the law, by force of a specific attachment of it, and that the defendant had no power to give it up. In this case the bailiff deposited goods which he had no right to take, they being the goods, not of the debtor who was the defendant in the action, but of a third party: they are demanded, and there was a positive refusal: that is sufficient evidence of a conversion.

PATTESON J.—I agree in the distinction; the officer had taken goods he had no right to take. On a demand being made of them, the defendant refused to give them up, and said she was indemnified in holding them.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

G.

(a) 5 B. & Ald. 247.

(c) 2 C. M. & R. 495.

(b) 8 M. & W. 540.

1842.

*Saturday,  
June 15th.*

CHURCHILL v. BERTRAND, administratrix, &c., of  
W. BATEMAN.

The grantees of an annuity, which had been avoided for a defective memorial by the administratrix of the grantor, brought an action against the administratrix to recover the balance of the consideration money. The declaration, in assumpsit for money had and received to the use of the plaintiffs, alleged the money to have been had and received by the intestate. — *Held*, issue being joined on a plea of non assumpsit, that the consideration money did not become money had and received until the avoidance of the annuity by the administratrix, and that it was therefore not money had and received by intestate at all, and that the declaration was not supported by the facts.

**ASSUMPSIT** against *Susanna Bertrand*, administratrix, &c., of *William Bateman*, for money had and received. The first count of the declaration alleged that *Bateman* was indebted in his lifetime to the plaintiff for money had and received by him; the second, on an account stated between the plaintiff and him. In these counts the promise was alleged to be by the intestate. The third and fourth counts alleged *Bateman* to have been indebted in like manner, and alleged promises by the defendant as his administratrix. There was a fifth count on an account stated between the plaintiff and the defendant as administratrix. Pleas to the whole declaration, non assumpsit by the defendant, or her intestate; to the first and second counts, payment by the intestate to the plaintiffs; to the third fourth and fifth counts payment by the defendant as administratrix; and to the whole declaration *actio non accrevit infra sex annos* (a). On these pleas issue was joined.

At the trial at Guildhall, at the sittings after Trinity term, 1841, before *Wightman J.*, it appeared that this was an action brought to recover a balance of the consideration money, paid by the plaintiff to *Bateman* for the grant of an annuity. The annuity was granted by *Bateman* to the plaintiff 7th June, 1823. *Bateman* paid the annuity regularly until his death on the 14th January, 1830, and the defendant paid it up to the 7th March, 1838, at which time the annuity was set aside for a defect in the memorial. A verdict was found for the plaintiff. Leave was reserved to the defendant to move to enter a verdict for her on the pleas of non assumpsit, and the Statute of Limitations. In Michaelmas term following, *Butt* obtained a rule accordingly, against which

(a) The defendant pleaded also a set-off and *plenè administravit*.

*Warren* shewed cause (a). There is no point on the plea of the Statute of Limitations, as the defendant, the administratrix, had made payments within six years, which, if a debt were ever due at all, would prevent the operation of the Statute of Limitations. But it is said that there is no right of action at all. It is contended that the money received as the consideration for an after-avoided annuity, does not become money had and received to the use of the grantee, until the act is done which avoids the annuity. As an authority for this position *Cowper v. Godmond* (b) was cited. It is said to be a consequence from this principle, that the testator, by whom alone the declaration states the money to have been had and received, in the legal sense of the words, never had and received it at all. In *Cowper v. Godmond* (b) the question was, whether the Statute of Limitations ran against the grantee of an annuity, in such an action as this, from the time of the receipt of the consideration by the grantor, or from the time of his electing to treat it as void, and it was decided that it ran from the latter period only. But that rule is not to be applied literally and universally. It was reasonably decided in an action brought by the grantee, where the grantor sought to prevent the plaintiff from recovering by the bar of the Statute of Limitations, which was available, if it could be considered to be running during the time in which the grantor treated the annuity as valid and subsisting, and during which therefore he ought to be precluded, that the consideration money was money had and received to the use of the plaintiff, instead of a consideration for an annuity, which could not be recovered back until some act done to avoid the annuity: *Davis, executrix, v. Bryan* (c). As said by Lord *Ellenborough* in *Hicks v. Hicks* (d), "This was either

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(a) Sittings in banc after Trin. term, 1842, June 23, before Lord Denman C. J., Patteson, Williams and Wightman Js.

(b) 9 Bing. 748; S. C. 3 M. & Scott, 219.

(c) 6 B. & C. 651; S. C. 9 D. & R. 726.

(d) 3 East, 16.



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an annuity or not an annuity. If not an annuity, the sums paid on either side were money had and received by the one party to the other's use." Taking this case in conjunction with *Cowper v. Godmond* (a), it shews that at all times from the first payment of the consideration of an annuity afterwards avoided, that consideration was money had and received to the use of the grantee, but the grantor, by whose act it becomes so, is estopped from saying that it was so until he has avoided it, before which period the grantee could not have recovered it back. That was the argument of *Wilde Serjt.*, who succeeded in the case of *Cowper v. Godmond* (a). *Chappell v. Poles* (b) is an analogous case to *Hicks v. Hicks*. It was an action to recover money paid to indemnify parish officers for the maintenance of a bastard. [*Patteson J.* In this case the question seems to be, not so much whether the action will lie, as whether the declaration is properly framed.] There was no other mode of framing it. If the declaration had alleged that the money had been had and received to the use of the administratrix, it would not have been supported by the fact. [*Wightman J.* Such a count, if it made the administratrix liable at all, would have made her so whether she had assets or not, though she has done nothing but pay the annuity since the death of the intestate. ]The plaintiff has a right to recover his money, this is the only form of action in which he can recover it. He would undoubtedly have had a right to recover this money if the intestate had lived, and his death cannot alter the plaintiff's rights. *Actus Dei nemini facit injuriam*.

*Butt*, in support of the rule. The plaintiff is in a dilemma: the money is either money had and received by the intestate, and then the Statute of Limitations applies, or it is money had and received by the administratrix, and then the declaration is not supported. *Cowper v. Godmond* (a) is

(a) 9 Bing. 748; *S. C.* 3 M. & Scott, 219.

(b) 2 M. & W. 867.

a direct authority that the consideration does not become money had and received until the annuity is vacated.

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*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court. The count in the declaration on which this case turns was a count for money had and received by the *defendant's intestate* to the use of the plaintiff, and a promise by the defendant as administratrix to pay. The defendant pleaded non assumpsit, and the Statute of Limitations.

An annuity was granted to the plaintiff by the defendant's intestate in 1823, the memorial of which was defective.

The intestate paid the annuity till his death in 1830.

The defendant paid it afterwards till 1838, when she procured it to be set aside for the defect in the memorial.

The rule in this case was to enter a verdict for the defendant on the two pleas above stated.

The Court of Common Pleas in *Cowper v. Godmond*(a) distinctly held that, under circumstances similar to the present, the money paid to the grantor of a defective annuity is not money had and received to the use of the grantee, until the grantor has elected to vacate the annuity, and that such election does not make the money had and received to the use of the grantee, from the time of the grant by relation.

That being the law, the money in this case was not had and received *to the use of* the plaintiff till 1838, at which time the intestate had been dead eight years, and so could not be money had and received by *him* to the use of the plaintiff, and the rule must be absolute to enter up a verdict for the defendant on the plea of non assumpsit.

Rule absolute.

G.

(a) 9 Bing. 748; S. C. 3 M. & Scott, 219.

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Goods exceeding 10*l.* in price were verbally ordered of the plaintiff; no particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between the plaintiff and vendee. The plaintiff afterwards forwarded the goods by the defendant, who was a common carrier. The goods were lost while in the defendant's custody. — *Held*, that the plaintiff was the proper party to bring an action for the loss of the goods, the property therein not having passed to the vendee.

COATES and another *v.* CHAPLIN and HORNE.

### CASE against carriers.

The declaration stated that the defendants were common carriers for hire in connection with the Grand Junction Railway Company, to carry and convey goods from the London terminus of the London and Birmingham Railway, and to deliver the same to the consignees thereof in London and its vicinity; that the plaintiffs heretofore, to wit, &c., caused to be delivered to the Grand Junction Railway Company, and the said Grand Junction Railway Company accepted from the plaintiffs, a certain parcel containing certain goods, &c., of the value, to wit, of 190*l.*, to be by them conveyed from Liverpool to London; that having so conveyed the goods to London, the Company then delivered them to the defendants as such common carriers *for and on behalf of the plaintiffs*, to be carried by the defendants from the terminus and delivered to the consignees in London; that the defendants as such common carriers then received the goods *for and on behalf of the plaintiffs* for the purpose aforesaid; yet the defendants did not deliver the goods, but so negligently conducted themselves, that the same were lost, &c.

Second plea. That the Grand Junction Railway Company did not deliver the goods to the defendants *for and on behalf of the plaintiffs*, to be conveyed to the consignees, nor did the defendants take or receive the same *for and on behalf of the plaintiffs* for the purpose aforesaid, in manner and form, &c. Issue thereon.


At the trial before *Wightman J.* at the Middlesex sittings in Trinity term, 1841, it appeared that the goods were verbally ordered of the plaintiffs by the traveller of *Morrison, Dillon & Co.* the consignees. On the 18th August, 1841, an invoice was sent to *Morrison & Co.* by post, addressed to them as *I. & T. Morrison*, which was in a printed form generally used by *Coates & Co.*, headed with the name of

their firm. This letter, as it appeared at the trial, had been safely delivered. The goods were directed *I. & T. Morrison*, and delivered to the Grand Junction Railway Company, by whom they were carried to London, and handed over to *Chaplin* and *Horne*, the defendants. On the following day they were carried by the defendants' porter to Messrs. *Morrison* and *Dillon*, but their clerk declined to take them in, alleging that they were not for them, but directed to some other firm. The porter accordingly carried the parcel back, and deposited it in a warehouse belonging to the defendants, from which it was lost. It was objected that the action ought to have been brought by *Morrison & Co.*, inasmuch as the invoice was a sufficient memorandum within the Statute of Frauds to vest the property in the consignees, and that at any rate the property in the goods had passed to them by the delivery to the Grand Junction Railway Company. It was further argued on the same grounds, that the defendants were entitled to a verdict on the above issue, inasmuch as the property having vested in the consignees by the delivery to the carriers, the Grand Junction Railway Company had not delivered the goods to the defendants, nor had the defendants received them *for and on behalf of the plaintiffs*, but for and on behalf of *Morrison & Co.* The learned judge directed the jury to find a verdict for the plaintiffs, with liberty to the defendants to move to enter a nonsuit or a verdict for them on the above issue.

*Platt*, in the same term having obtained a rule nisi accordingly,

*Erle* and *Knowles* now shewed cause. The cases shew that, where there has been a valid and complete contract of sale between the parties, the delivery to the usual or agreed carrier will vest the property in the consignee; but it is otherwise if there has not been a valid sale within the pro-

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visions of the Statute of Frauds. In *Swain v. Shepherd* (a), Parke B. lays down the rule to be, that where goods of a fair merchantable quality are forwarded in pursuance of a written order, *which binds the person to receive the goods*, the property passes to that person by the delivery to the carrier, and he is the proper person to sue the carrier, if the goods are lost. Now here it cannot be said that *Morrison & Co.* were bound to receive the goods, for they might still, as is said in *Smith v. Surman* (b), have objected to the quantum or the quality of the goods, which they had only verbally ordered. In *Fragano v. Long* (c), where the consignee was held to be the proper party to sue the carrier of his goods, for the damage which had happened to them by his carelessness in the transport of them, there was a written order for the goods, signed by the consignee, which bound him to receive them, if they reasonably corresponded to that order, so that that case falls within the principle of *Swain v. Shepherd* (a). As to the earlier cases which will be relied on for the defendant, *Dawes v. Peck* (d), and *Dutton v. Solomonson* (e), they are supported by *Littledale J.* in *Freeman v. Birch* (f), on the ground, that, under the particular circumstances, the property in the goods had entirely gone out of the vendor. In both those cases the mode of carriage was expressly named by the vendee, and the goods were therefore at the risk of the consignee as soon as they were placed in the hands of the carrier. [Patteson J. According to the argument of the defendants, the plaintiffs are in this situation, that they cannot sue the carriers for the loss of the goods, nor can they sue the consignee for the price]. Supposing that they were to sue the consignees for the price of the goods, it would be a good defence for them to say, that there was no note or memorandum to bind them, nor delivery and acceptance, so as to satisfy the statute. In *Clarke v.*

(a) 1 M. &amp; Rob. 223.

&amp; R. 283.

(b) 9 B. & C. 577; S. C. 4 M. & R. 455; see too *Howe v. Palmer*, 3 B. & Ald. 321.

(d) 8 T. R. 330.

(e) 3 B. &amp; P. 582.

(f) 1 N. &amp; M. 420.

(c) 4 B. &amp; C. 219; S. C. 6 D.

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*Hutchins (a)*, in assumpsit for goods sold and delivered, a delivery to the carrier was held not to be a delivery to the vendee. In *Hanson v. Armitage (b)*, a delivery of goods to a wharfinger, who was accustomed to forward goods from the plaintiff to the defendant, which goods were afterwards lost while in the possession of the carrier, was held not to be a delivery and acceptance so as to take the case out of the statute. Here there is nothing to shew that the defendants were either the usual or agreed carriers between the plaintiffs and the consignees. Nor if that had appeared would it have affected the case, as there was no written order for the goods which would have obliged the consignees to receive them in case they were of the quantity and quality directed by the order. It is true that in *Schnieder v. Norris (c)*, a bill of parcels in the same form as the invoice in the present case, in which the name of the vendor was printed, and the name of the vendee written by the vendor, was held a sufficient memorandum of the contract within the Statute of Frauds; but that was to charge the *vendor*. The consignees in the present case could not have maintained trover; *Alexander v. Comber (d)*,

*Platt and Bros* contra. The rule, in cases like the present, is laid down in *Selwyn's* N. P. 406 (e), where all the cases on this subject are reviewed. It is there said, "In general, the action against a carrier for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time. When a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier such delivery operates as a delivery to the purchaser, and the whole property (subject only to the right

(a) 14 East, 475.

(b) 5 B. & Ald. 557.

(c) 3 Man. & S. 286.

(d) 1 H. Bl. 20.

(e) 10th ed.

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of stoppage in transitu by the seller) vests in the purchaser, he alone can maintain an action against the carrier for any loss or damage to the goods; and this rule holds, as well where the particular carrier is not named by the purchaser, as where he is." This seems to be a reasonable rule, because the price of the carriage is always, except by special agreement, paid by the purchaser; and, even where the seller pays for the carriage, still the goods are immediately upon the delivery to the carrier at the risk of the vendee: *King v. Meredith* (a), *Davis v. James* (b), *Bac. Abr. tit. Bailment, (B)*. So in *Wilbraham v. Snow* (c), *Snee v. Prescote* (d) is quoted, in which Lord Hardwicke decided that, if goods are delivered to a carrier to be delivered to A. and are lost, A. only can bring the action. *Godfrey v. Furzo* (e) also is in point. In answer to the objection of *Patteson J.*, *Groning v. Mendham* (f) is in point, which shews that the consignees might have brought their action against the carrier for the loss of the goods, or trover for the detention of them, and the vendors would then in turn have recovered from them the price. If this be so, the consignees might have brought their action against the defendants in the present case, and therefore they must be the only parties who can. It is submitted that the argument as to the vesting of the property, derived from the Statute of Frauds, is founded on a fallacy; as was said in *Stead v. Dawber* (g), it confounds the contract with the remedy upon it. It might be, perhaps, that for want of a written agreement the contract, as between vendor and purchaser, could not be enforced; but still there was a contract subsisting as against third parties. The Statute of Frauds throws difficulties only in the way of the evidence of a contract: *Thornton v. Kempster* (h). If the vendors had stopped the

(a) 2 Camp. 639.

(b) 5 Burr. 2680.

(c) 2 Wms. Saund. 47.

(d) 1 Atk. 248.

(e) 3 P. Wms. 185.


(f) 5 M. &amp; S. 189.

(g) 10 A. &amp; E. 57; S. C. 2 P. &amp; D. 447.

(h) 5 Taunt. 786; S. C. 1 Marsh. 355.

goods in transitu, and it had turned out that the consignees were not insolvent, they might have maintained trover for them.

*Cur. adv. vult.*

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LORD DENMAN C. J.—I am of opinion that this rule must be discharged. It seems quite clear that, as between the consignees and the plaintiffs, the property had not passed out of the plaintiffs and vested in *Morrison & Co.*, so as to allow the plaintiffs to maintain an action for goods sold and delivered. The consignees had not accepted the goods, and therefore in the absence of a written order the provisions of the Statute of Frauds have not been complied with, so as to charge them. Then does the invoice make a difference? It clearly does not, for the reasons adduced by the plaintiff in argument. The order, which was a verbal one, seems to have been, in general terms, a mere parol order for such and such goods, without any mention of any particular carrier, or even, as far as it appears in evidence, of any mode of carriage at all. Even supposing therefore that we were to hold that the delivery to a carrier, who was named by the consignees, would be a delivery to the consignees, how would that affect the present case, where the carrier was selected by the plaintiffs? This case seems to me to fall directly under the principle of *Swain v. Shepherd* (a), in the authority of which, though it may be expressed perhaps somewhat too generally, I entirely concur.

PATTESON J.—I am of the same opinion. If the circumstances under which the order were given had been more clearly before us, it might have been different, but we are left entirely in the dark as to what passed between the parties on that occasion. The agent of *Morrison & Co.* might probably have expressly directed the mode of carriage,

(a) 1 M. & Rob. 223.



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and I am not prepared to say that such a circumstance would not have affected our opinion. However, that does not arise here. For all that appears, *Morrison & Co.* might have intended to send for the goods. Even if there had been a written order, which was equally silent as to the mode of carriage, we have had no authority cited to us to shew that even then, upon their own voluntary delivery of the goods to the carrier, the plaintiffs could have brought their action against *Morrison & Co.* for goods sold and delivered.

WILLIAMS J.—No doubt the carriers are liable to one party or the other, either to the plaintiffs or the consignees, for the jury have distinctly said that the goods were lost by their negligence. So that the present question is material only to the defendants, in order that they may not find themselves in the situation of having paid the wrong party, and so be called on to pay over again. The former cases all proceed on the ground that a particular carrier or method of carriage had been ordered by the consignee; but here there is no direction at all. Probably *Morrison & Co.* would, if the plaintiffs had waited for directions, have sent orders how the goods were to be sent, which, on the strength of the older authorities, might have altered our decision. However, I say nothing as to that. The other point urged for the plaintiff seems equally decisive of the case to my mind. It is quite clear that *Coates & Co.* could not have sued *Morrison & Co.* for the price of the goods, and therefore the property in them was clearly still vested in the consignors.

WIGHTMAN J.—In order that this action should have been brought by the consignees, the property in these goods must have vested in them. Now what are the circumstances which, according to the defendants, are to have that effect in the present instance? No carrier is named by the con-

signee, and the consignor, on his own responsibility, selects some one whom he prefers to transport the goods, without the concurrence or knowledge of the vendee. In *Dutton v. Solomonson* (a), which has been mainly relied on by the defendants, it is clear, from the judgment of Lord *Alvanley*, though it does not appear from the statement of the case, that the mode of carriage was expressly named by the vendee. He seems expressly to ground his judgment in that part of the case; on that circumstance, as he says, "If a tradesman order goods to be sent by a carrier, though he does not name the particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser." But in the present case there is no fact of that kind. There is a case of *Hart v. Sattley* (b), which was decided at nisi prius, and goes the length that, if goods are ordered verbally, the delivery of them to a carrier is sufficient to bind the contract, according to the Statute of Frauds, where the purchaser has been in the habit of receiving goods from the vendor by the same mode of conveyance. But even that fact does not appear here; there is nothing to shew that the mode of carriage adopted in the present instance, was that which was usual between the parties, and, if we were now to give our judgment for the defendants, we should in effect decide that a delivery to any indifferent carrier, on the mere motion of the vendor, was in law a delivery to the vendee. The rule must be discharged.

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Rule discharged.

(a) 3 B. & P. 582.

(b) 3 Camp. 528.



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Jurisdiction is given to magistrates to make an order of removal upon due complaint of inhabitancy and chargeability in the complaining parish, and statement of settlement in the parish removed to; and such jurisdiction does not depend upon the facts of such inhabitancy, chargeability or settlement.

The insufficiency, therefore, of the examination, which is merely evidence of such facts, does not affect the jurisdiction of the magistrates, but merely shews they have come to a wrong conclusion.

This Court will not revise the conclusion of the removing magistrates, however erroneous it may be, when once their jurisdiction appears.

This Court, therefore, will not issue a certiorari to bring up an order of removal, upon affidavits setting out the examination, although it may contain no evidence of inhabitancy or chargeability, if the order itself states a proper complaint of such inhabitancy and chargeability.

Where the parish of "All Saints, Poplar," appealed against an order of removal made upon it by the description of "Poplar" only, the Court refused a certiorari applied for on the ground of such misdescription.

The QUEEN v. The Justices of BUCKINGHAMSHIRE (a).

*PLATT*, in Michaelmas term, obtained a rule calling upon the above justices to shew cause why a writ of certiorari should not issue directed to them to remove into this Court an order made by two of the said justices on the 5th March last for the removal of *Maria Bavin* and her two children from the parish of High Wycombe, in the said county, to the parish of All Saints, Poplar, in the county of Middlesex, the examinations on which the said order of removal was made, the notice and grounds of appeal against the said order, and an order of sessions made on or about the 28th June last, confirming the said order of removal, together with all proceedings of the said sessions touching the said order of removal.


The rule was obtained by the parish officers of "All Saints, Poplar" (b), upon affidavits, annexing copies of the examination, order of removal and grounds of appeal.

The sessions had confirmed the order, and refused to grant a case for the opinion of the Court, on the alleged insufficiency of the examinations.

The order of removal commenced thus:—"To the overseers of the poor of the parish of *High Wycombe* in the county of *Bucks*, and to the overseers of the poor of the parish of *Poplar* in the county of *Middlesex*, and to each and every of them. Whereas *complaint* hath been made unto

(a) Decided in Hil. Term, 1843 that the parish was misdescribed in the order of removal.

(b) See *post* as to an objection,

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us whose names are hereunto set and seals affixed, being two of her majesty's justices of the peace acting in and for the said county of Bucks (one whereof being of the quorum), by the overseers of the poor of the said parish of High Wycombe, that *Maria Bavin* and her two children have come to inhabit in the said parish of High Wycombe not having gained a settlement, &c., and now actually become chargeable to the same parish," &c. The order then proceeded to adjudge the settlement of the paupers to be "in the said parish of Poplar, in the said county of Middlesex," and concluded by requiring "the said overseers of the said parish of High Wycombe to remove the paupers from and out of your said parish of High Wycombe to the said parish of Poplar," &c. &c.

The order was made on two examinations; one examination was intituled, "The examination of *Maria Bavin*, at present residing at *Great Marlow* in the county of Bucks;" and in it the examinant stated, "I have been in Marlow workhouse three weeks last Wednesday with my two children." The other examinant stated, "I am master of the workhouse at Great Marlow; *Maria Bavin* and her two children came into the house three weeks last Wednesday; they are chargeable to the parish of High Wycombe in the county of Bucks." Neither examination contained any further statement respecting Great Marlow.

The principal ground on which the rule was moved was, that the residence and chargeability of the paupers in High Wycombe did not appear upon the examinations, so as to shew the jurisdiction of the removing justices.

The proceedings in question were also objected to on other grounds as hereafter stated.

*Pashley* now shewed cause. The cases of *Reg. v. Rotherham* (a) and *Ex parte the Churchwardens and Overseers of Tollerton* (b) shew that this Court will not grant a certiorari

(a) *Ante*, p. 523.

(b) *Ante*, p. 533.

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as here prayed. It is true that, in the first of those cases, the argument on the sufficiency of the examinations did not arise before the documents had been returned; and in the second, the objection taken was merely to the sufficiency of the evidence of settlement in the appellant township, contained in the examinations. But whether the examinations be here or elsewhere, and whether the defects relate to the settlement in the appellant parish, or to the residence in the removing parish, is immaterial. It may be contended that there is in this case no sufficient evidence in the examinations, of residence in High Wycombe, to warrant the allegation of inhabitancy in that parish, contained in the order of removal. Whether the evidence in that respect is or is not sufficient was for the justices who made the order to say. They decided the matter; and their decision has been reviewed and upheld by the sessions, who have, in express terms, declared their concurrence in what had been done, by refusing to grant a case. That decision of the justices, so reviewed by the sessions, is not open to review by this Court; but, on a return to a *certiorari*, the order of removal must be taken as *conclusive* evidence of all the material facts on which it adjudicates. This would be so even if it were proposed to contradict those facts, still more is it so where all that it is proposed to shew is, that the justices who made the order of removal had before them only insufficient evidence of facts, which unquestionably existed. The adjudication in a conviction, and the same rule applies to an order, was held to be conclusive in *Brittain v. Kinnaird* (a). Dallas C. J. there says, "The magistrate, it is urged, could not give himself jurisdiction by finding that to be the fact, which did not exist. But he is bound to inquire as to the fact, and when he has inquired, his conviction is conclusive of it. The magistrates have inquired in the present instance, and they find the subject of conviction to be a boat. Much has been said about the danger of magistrates giving themselves

(a) 1 B. & Bing. 432.


jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally, and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend every thing against a stinted jurisdiction; that is not the rule now, and nothing is to be intended but what is fair and reasonable, and it is reasonable to intend that the magistrates will do what is right." The judgment of *Patteson J.* in *The Queen v. The Warden of the Fleet* (a) is strongly in point to the same effect. The order, therefore, being good on its face, could not be quashed on account of defects in the examinations, whatever those defects may be, if the examinations were brought up. It is submitted that the moment churchwardens and overseers make a proper complaint to justices, as on this order is alleged to have been done, the jurisdiction of the justices to inquire is created. The facts of residence and chargeability in the removing parish cannot be essential to the jurisdiction of the justices to enter upon the inquiry, by which that residence and chargeability are to be determined. The statement or complaint of such facts by the officers of the removing parish is all that is necessary.

Conceding that a *certiorari* lies to remove all judicial proceedings, it is contended that the examinations in question are not a judicial proceeding at all. Although the order of removal is a judicial proceeding, yet the examination needed not have been even in writing, before the 4 & 5 Will. 4, c. 76, s. 79, directed that a copy of such examinations should be sent as there mentioned. In *Taylor v. Clemson* (b) it is said, by Lord Abinger C. B., "The

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(a) See *post*.

(b) 2 G. &amp; D. 346.

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inquisition is the only judicial proceeding. It refers to the warrant as the only preliminary fact necessary to give the sheriff jurisdiction. The warrant does not itself recite any preliminary fact, but it is not a judicial instrument; it is merely an act of one of the parties litigant." So here, the examinations are the act of one of the parties, and no judicial proceeding at all. The principle, contended for, that an order is conclusive evidence of all facts essential to its validity, and which it states, is acted on and recognised in *Yorke v. Brown* (a), where the Court held that a certain date was "an essential part of the adjudication, and consequently the adjudication is good proof of it." Every fact essential to the validity of this order is stated on the face of it.

The language of the Court in *Reg. v. Alterun* (b) and *Reg. v. Middleton in Teesdale* (c), will perhaps be relied on in support of this rule; in the former of which cases it is said, "It is decided now that every thing requisite to make the removal valid must appear on the order and *examinations*." But although this and similar expressions have fallen from the Court in several recent cases, yet it has always been in cases where, at the request of the quarter sessions, on a case stated, this Court had taken upon itself the duties of the quarter sessions, and was in fact sitting professedly as a court of appeal, to determine whether the removing justices had rightly drawn the conclusions stated in their order, from the data contained in the examinations. Where the justices refuse so to refer the matter to this Court, it will be intended that their conclusion is right; at all events the law has given no means of reviewing it if wrong, and the statute of *Charles*, giving the appeal to the sessions, has made the decision of that tribunal final.

*Platt and Power* contra. As to the examinations, it has not yet been decided that they may not be removed for the

(a) 10 M. & W. 78, 84.

(c) 10 A. & E. 688; S. C. 3 P.

(b) 1 G. & D. 261; S. C. 10 A. & D. 471.

& E. 699.

purpose of inquiry into the validity of the order of removal itself. In *Reg. v. Rotherham* (a) the Court thought there was evidence of residence in the removing township. Here there is none. The evidence of these examinations is of residence in the parish of Great Marlow, and not in the parish of High Wycombe. In *Ex parte Tollerton* (b) also, the Court only decided that it would not review the order of sessions. The question here is, not merely as to the order of sessions, but as to the order of the removing justices. It is a question whether the removing justices did not act without jurisdiction. Undoubtedly this may be shewn by affidavits: *Rex v. St. James's, Westminster* (c), *Reg. v. Bolton* (d). The total want of evidence of residence in High Wycombe, apparent on the examinations, is a sufficient ground to induce the Court to grant the writ. Unless this Court so interfere, the justices may set at defiance the decisions of this Court, and may determine to disregard all rules of law respecting examinations, and may abrogate altogether the provisions of the Poor Law Amendment Act.

Independently of the insufficiency of the examinations, there are fatal defects on the face of the order of removal itself, and also of the order of sessions. 1. The order of removal does not state High Wycombe to be in the county of Bucks, so as to give jurisdiction to the justices of that county. It appears from the direction only, which is no part of the order, that High Wycombe is in the county of Bucks; in the order itself, High Wycombe is simply designated as the parish of High Wycombe. Again, the order of removal describes the parish of "All Saints, Poplar," as "Poplar," a parish which has no existence. On this point they referred to 2 *Nolan's P. L.* 230, and to *Rex v. Topham* (e).

2. The order of sessions misdescribes the order of removal, which is one for the removal of the paupers, as an

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(a) *Ante*, 523.

&amp; M. 252.

(b) *Ante*, 533.

(d) 4 P. &amp; D. 679.

(c) 2 A. &amp; E. 241; S. C. 4 N.

(e) 7 East, 466.



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order "whereby the said *Maria Bavin* and her said children *were removed* from High Wycombe to Poplar." [*Pashley*. The order of sessions is not before the Court: the affidavits on which the rule was granted only set out the order of removal, the examinations, and the grounds of appeal.]

*Pashley*, in answer to the two objections taken to the form of the order of removal, was stopped by the Court.

LORD DENMAN C. J.—On the main question now raised, our opinion will not interfere with the judgment of this Court in the case of *Reg. v. Bolton (a)*. When properly considered, the fair meaning of what was there said is, that, if justices act in a case not properly brought before them, such a state of things may be shewn to this Court on affidavit. So, in the present case, if the magistrates had acted without any complaint having been made to them by the parish officers of High Wycombe, the case in which they assumed to make their order would not have been properly before them. The fact of such a complaint was essential to their jurisdiction; and, if they had acted without such a complaint, it would be the duty of this Court to interfere. But if there be a complaint made to the magistrates, and it need not that I know even be in writing, and the complaint states the chargeability, inhabitancy and settlement of the pauper, they have jurisdiction to enter on the inquiry. One fact on which they must then decide is the chargeability, another is the residence, and a third is the settlement of the supposed paupers. The evidence given in the present instance enabled the magistrates satisfactorily to themselves to adjudicate on all these facts. The recent cases which have been referred to decide that we shall not grant a writ of *certiorari*, with a view to determine whether sufficient appears on the face of the examinations to justify the *conclu-*

sions drawn from them by removing justices, after they have once rightly entered upon the subject of their inquiry. The examinations are what the justices have acted on, not in entertaining, but in carrying through their inquiry. In this point of view, the decisions of this Court last term, in the cases of *Reg. v. Rotherham* (a) and *Ex parte Tollerton* (b), do not interfere with the case of *Reg. v. Bolton* (c).

As to the objections made to the order of removal, they are of a very unsubstantial character. High Wycombe is sufficiently shewn to be in the county of Bucks by words of reference, and perhaps even such words of reference were unnecessary. As to the other objection it has often been held that a parish may appeal although misdescribed in the order appealed against. The parish of "All Saints, Poplar," has appealed and has been heard upon the merits, without, so far as it appears, even taking this objection.


In conclusion, I must observe that although on objections like these, where no case has been stated, we cannot review what has been done below, yet we are extremely desirous that there should be a fair trial of all points which arise before the Court below. We have taken great pains to exact on the one hand from respondents a full statement in their examinations of their grounds of removal, and from the appellants on the other hand an equally full statement of their grounds of appeal. These statements being required, it is most desirable that the justices should, in disposing of such questions as arise before them, exercise reasonable intendment, with a full desire to do justice between the parties. Where they have disposed of such questions, we are bound by the late decisions to say that the examinations on which an order has been made cannot be removed.

PATTESON J. concurred.

(a) *Ante*, 523.

(b) *Ante*, 533.

(c) 4 P. & D. 679.

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COLERIDGE J.—In this case the order of removal is clearly good on the face of it. It is alleged, however, that the magistrates had no jurisdiction to make it, and that in order to satisfy ourselves that such was the fact, we must either bring up the examinations by *certiorari*, or hear the objection to those examinations as disclosed in the affidavits used. As to the first method, we have already refused to accede to the proposition. As to the other course, undoubtedly there are cases in which we may inquire on affidavits, as was said in the case of *Reg. v. Bolton*, whether magistrates have jurisdiction. But on the making of a complaint by parish officers, as stated in the order, magistrates have jurisdiction. On the complaint being made, they are to inquire into the chargeability and residence of the paupers. The magistrates here state that they have done so. If they have decided wrongly, they have only come to a wrong conclusion on the evidence laid before them. The case is that put by the Lord Chief Justice of the Common Pleas in the passage cited from *Brittain v. Kinnaird*(a). On the principle there laid down, the Court would not receive an affidavit to shew that that which a magistrate had adjudged to be a boat was in fact a seventy-four gun ship.

WIGHTMAN J. concurred.

Rule discharged.

D.

(a) 1 B. & Bing. 432.



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Monday,  
June 6th.

HEY v. WYCHE.

**COVENANT.** The declaration stated that, by indenture of the 23d February, 1832, certain persons of the name of *Fleming and Hall* demised to the plaintiff certain premises for twenty-one years, and that by the said indenture the plaintiff for himself and his assigns &c. covenanted with *Fleming and Hall* that he or his assigns &c. would during the term keep the premises insured from loss or damage by fire in the sum of 1000*l.* in the joint names of *Fleming and Hall* and the plaintiff, and, in case the premises should be damaged or destroyed by fire, that the plaintiff would lay out the money recoverable under the policy in repairing or rebuilding the premises, and if the money so recoverable should not be sufficient for the above purposes, then that the plaintiff would himself make good the deficiency.

Plaintiff, a lessee under covenant to insure against fire in his own name and that of the lessor jointly, assigned to defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire policy, which had been effected, the plaintiff effected a fresh one, but in his own name only. No fire happened. The plaintiff brought covenant against the defendant for neglecting to insure. Defendant pleaded payment of a farthing into Court.

The declaration then stated the entry of the plaintiff, and that by indenture of the 18th November, 1836, the plaintiff assigned the premises to the defendant and one *Hartley* for the residue of the term; that the defendant thereby covenanted with the plaintiff that he would keep all the covenants in the indenture of the 23d February contained, on the part of the lessee or assignee to be performed, and of and from the same, and of and from all actions, suits, claims, damages, costs, charges, and expenses which the plaintiff might bear, pay, incur, &c. by reason of the non-performance thereof, would save the plaintiff harmless and indemnified.

*Held*, though the plaintiff had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to

Breach, that defendant did not insure, but, on the contrary, to wit, on the 14th April, 1838, and for a long time, to wit, from thence hitherto suffered the premises to be uninsured, &c. and by reason and in consequence of such breach of covenant by the defendant, and in order to enable the plaintiff to secure and have a fund and means to repair or rebuild the said premises, in case the same should be

which he had been exposed by the defendant's default.

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damaged or destroyed by fire during the term granted by the said indenture of the 23d February, 1832, and to enable him to fulfil his covenant so made by him the plaintiff with *Fleming and Hall* as aforesaid, he the plaintiff was forced and obliged to pay and expend, and afterwards, to wit, on the 21st April, 1838, did pay and expend a large sum of money, to wit, 5*l.* 10*s.* 2*d.* in and about the insuring the premises, and was thereby damnified to a large amount, to wit, the amount last aforesaid, of all which defendant afterwards, &c. had notice. Yet he has not indemnified the plaintiff against the damages so by him the plaintiff sustained.

Plea : Payment into Court of one farthing, and no damages ultra. Verification.

Replication : Damages ultra, and issue thereon.

The cause was first tried before Lord *Denman* C. J. at the London sittings after Michaelmas term, 1838. It appeared that during the continuance of the term assigned to the defendant, subject to the covenants in the lease to the plaintiff as stated in the declaration, namely, on the 12th April, 1838, the plaintiff called at the insurance office in which the defendant had up to that time insured the assigned premises, and learned that the defendant's policy would expire on that day. As the defendant had previously been irregular in paying the premiums on the policy, the plaintiff immediately paid 1*l.* for an insurance for a few days, on the understanding that it was afterwards to be continued by him, if the defendant did not continue it. On the 21st of April the plaintiff called at the insurance office again, and, finding that the defendant had not insured in the interval, effected a fresh policy on the premises, and paid 4*l.* 10*s.* 2*d.* by way of premium in addition to the 1*l.* paid before. This policy was effected by the plaintiff in his own name, and not in the joint names of himself and *Fleming and Hall*, as required by the covenants in the lease to the plaintiff. His lordship directed the jury that the plaintiff, on the defendant's default, was entitled to insure the

premises, and to recover, by way of indemnity, the amount paid for the insurance. Verdict for the plaintiff, damages 5*l.* 10*s.* 2*d.*

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Sir *W. W. Follett*, in the Hilary term following, obtained a rule nisi for a new trial, on the ground of misdirection. Cause was shewn against this rule in Trinity term, 1840, by

Sir *F. Pollock* and *Martin*. In support of the rule, it was contended that the plaintiff was entitled to no more than nominal damages, and that the money paid by the plaintiff for premium could not be recovered, because it could not in any way enure to the defendant's protection, the plaintiff, after assigning the premises having no insurable interest, and the insurance in his own name being no compliance with the covenant to insure in the names of himself and the lessors jointly.

Rule absolute.

The cause was tried before Lord *Denman* C. J. a second time at the London sittings after Easter term, 1841. His lordship directed the jury that, though the plaintiff could not call upon the defendant to reimburse him in respect of the particular sums expended in effecting an insurance on defendant's default, yet it was for them to say whether the risk to which the plaintiff had been exposed by such default did or did not entitle the plaintiff to more than nominal damages. The jury assessed the damages at 5*l.* 10*s.* 2*d.* the exact sum expended by the plaintiff in insuring, but his lordship doubting whether, after the judgment of the Court in making the above rule absolute for a new trial, the plaintiff was properly entitled to more than the nominal damages, which had been paid into Court, directed the verdict to be taken for the defendant, and gave the plaintiff leave to move to set it aside, and to enter the verdict for himself for the sum of 5*l.* 10*s.* 2*d.*

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Martin, in the Trinity term following, having obtained a rule accordingly,

Kelly now shewed cause. The plaintiff was entitled to no more than nominal damages. The declaration alleges as special damage that the plaintiff was obliged to expend the sum of 5*l.* 10*s.* 2*d.* in consequence of the defendant's breach of covenant. No other damage is alleged, and it is clear that no other damage could be alleged, for the plaintiff is not to be compensated for any anxiety of mind he may have suffered from the defendant's neglect to insure. The jury had no right to take, as a measure of damages, the sum expended by the plaintiff in entering into an invalid policy. He then contended that the policy was useless to the defendant, on the ground taken in the former argument.

Martin contrà. The defendant must contend, as a matter of law, that the jury were restricted to nominal damages. If they were not so restricted, they might give damages according to the measure adopted by them or any other measure, for the damages are not complained of as excessive, if more than nominal damages could be given. It is a mistake to suppose that the policy effected by the plaintiff was useless to the defendant. The plaintiff had an insurable interest notwithstanding the assignment, for it was not necessary that he should have an interest in the very bricks of the building; his interest arising from his liability under the covenant was sufficient. If plaintiff had been sued by the lessor for breach of covenant, he would have had no defence. Why should he not be compensated for that risk? The plaintiff, therefore, had an insurable interest, and the fund enured to the benefit of the defendant.

LORD DENMAN C. J.—I thought myself bound by the judgment of the Court on granting the new trial in this case, not to lay it down as a rule that the jury might give

damages by way of indemnity for the specific sum expended by the plaintiff in insuring. It appears that I did not lay down such a rule, and no complaint is made of misdirection. It seems the jury were asked whether the risk to which the plaintiff had been exposed by the defendant's default entitled the plaintiff to more than nominal damages. The jury chose to give more than nominal damages; they gave the very amount which the plaintiff had expended. We think the jury might properly give more than nominal damages; and, if so, as the particular amount awarded by them cannot be objected to, that the verdict must be entered for that amount.

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PATTESON J.—On the former trial it was laid down as a rule that the plaintiff had a right to be indemnified for what he had laid out in insuring. I cannot say, however, that the jury could not give more than nominal damages, and I do not think that the circumstance of the damages, as estimated by them, coinciding in amount with the sum expended by the plaintiff, can be excepted to.

COLERIDGE J.—We have merely to say whether the jury were restricted to nominal damages. I am of opinion they were not. I should have had a difficulty, if the sum paid by the plaintiff had been put to the jury as the measure of damages.

D.

Rule absolute.

RUSSELL v. SHENTON.

Tuesday,
 May 31st.

CASE. The declaration stated that the plaintiff was possessed of a certain dwelling-house and premises with premises belonging to defendant and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the *owner* and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so, whereby, &c. *Held*, after pleading over, that the declaration was bad, as it did not shew that the defendant was the *occupier* of the drains, and the nuisance was not shewn to be of a permanent or continuing character.

In case for a nuisance, occasioned by drains on the

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the appurtenances, wherein he and his family inhabited, and that the defendant was the owner and proprietor of divers drains and sewers, to wit, three drains &c. situate and being in and upon certain premises belonging to the said defendant, and adjoining the said dwelling-house and premises of the said plaintiff, into and through which drains and sewers divers quantities of soil, filth and water from time to time passed and flowed, and by reason thereof the said defendant, as such owner and proprietor as aforesaid, during all the time aforesaid, ought from time to time well and sufficiently to have kept cleansed and repaired the said drains and sewers, and to have continually hindered and prevented the soil, filth and water so from time to time passing and flowing into and being in the said drains and sewers as aforesaid from unduly accumulating therein, and from running and proceeding therefrom unto or into the said dwelling-house and premises of the said plaintiff, nevertheless the said defendant well knowing the premises, but disregarding his duty in that behalf, and wrongfully and unjustly intending to injure and aggrieve the said plaintiff, and to incommode and annoy him and his family in the use and occupation and enjoyment of his said dwelling and premises, with the appurtenances, heretofore, to wit, on the 1st day of May, 1840, and on divers other days and times between that day and the commencement of this suit, wrongfully suffered the said drains and sewers to become foul and in bad repair, and also wrongfully suffered divers large quantities of soil and filth and water unduly to accumulate therein, and wrongfully kept and continued the said drains and sewers so foul and in bad repair, and so unduly filled and loaded with such soil and filth and water as aforesaid, for a long space of time, to wit, thence and hitherto, and by reason thereof and of the said drains and sewers being so foul and in such bad repair as aforesaid, and of such soil, filth and water having been so permitted by the said defendant unduly to accumulate therein as aforesaid, divers large quantities of the said soil, filth and

water then ran and flowed therefrom unto and into the said dwelling-house and premises of the said plaintiff, and thereby then caused divers noisome, offensive and unwholesome smells and vapours and stench to ascend and come unto and into the said dwelling-house and premises of the said plaintiff, and to annoy and incommode the said plaintiff and his family in their habitation of the said dwelling-house and premises; and also the walls, timbers, floors and paint of the said dwelling-house of the said plaintiff have by means of the said soil, filth and water, so running and flowing as aforesaid, become and are decayed and greatly damaged and injured, and the said plaintiff hath been and is by means of the premises hindered and prevented from inhabiting and dwelling in the said house in so beneficial a manner as he, before the committing of the said grievances by the said defendant, had been used and accustomed and would have continued to do, and the said plaintiff hath been and is by means of the premises otherwise greatly injured and aggrieved, &c.

Plea: That before and at the said several times when, &c. defendant was the owner and proprietor of the said drains and sewers in the said declaration mentioned, and of the land and premises in and upon which the said drains and sewers were and are constructed, formed and built, that is to say, of the reversion of and in the said drains, sewers, land and premises expectant on the determination of the demises hereinafter mentioned, but the defendant in fact further says, that he the said defendant, before any of the said several times when &c. had demised the said drains, sewers, land and premises, as to a certain part thereof, to one *John Linsey*, to wit, for one whole year, from the 29th day of September, 1840, and so on from year to year, as long as the defendant and the said *John Linsey* should respectively please, and as to the residue thereof, to one *Ann Burton*, to wit, for one whole year, from the 1st of January, 1841, and so on from year to year, as long as the defendant and the said *Ann Burton* should respectively please, which

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said demises at the said several times when, &c., and each and every of them, were and still are subsisting and undetermined, and the said sewers, drains, lands and premises, before and at the several times when, &c. were and each and every of them was in the possession and occupation as to such parts thereof respectively of the said respective tenants thereof exclusively as tenants thereof to the defendant, under and by virtue of the said respective demises as aforesaid, and the said tenants at the said several times when, &c. and each and every of them were in the possession of the said drains, sewers, land and premises as aforesaid, as to such parts thereof respectively as aforesaid, and were, as such tenants as aforesaid, liable and ought to have kept cleansed and repaired the same as to such parts thereof so being in their respective possession as aforesaid, and to have hindered and prevented the said soil, filth and water passing and flowing through the same as in the said declaration mentioned, from running and proceeding therefrom unto or into the said dwelling-house and premises of the plaintiff, and the said defendant was not, at the said several times, &c. or any or either of them, in the possession of the said drains, sewers, land and premises or any or either of them or any part thereof, nor could the said defendant lawfully have entered or gone in or upon the said sewers, drains, land and premises, or any part thereof, for the purpose of keeping, cleansing or repairing the same, or hindering or preventing the said soil, filth and water from running and proceeding therefrom, at the said several times when, &c., or any or either of them, unto or into the said dwelling-house and premises of the plaintiff, and this the defendant is ready to verify &c.

Special demurrer to the plea.

The case was now argued (a) by *E. James* for the plaintiff, and by *Butt* for the defendant, who objected to the validity of the declaration on the grounds stated in the paper books.

(a) Before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

The following were the grounds stated.

The defendant upon the argument on this demurrer will contend that judgment ought to be given for the defendant upon the following objections to the declaration.

'That the declaration ought to have stated the particular obligation and the grounds thereof under which the defendant was bound to the performance of the duty mentioned in the declaration, and that mere ownership of the drains and sewers does not constitute such an obligation.

That the statement of duty in the said declaration is an inference of law from the facts therein stated, and is so expressed in the said declaration itself, where it is alleged, that by reason of the facts therein stated such duty arose, whereas from the facts so stated no such duty arose or can be inferred by law.

That the cause of injury complained of is not the drains and sewers, but the use made of them as a passage for soil, filth and water, and the defendant is not answerable for such use of the said drains and sewers as owner and by reason thereof, as stated in the declaration.

That where in a declaration a nuisance is complained of, arising from a certain thing in the declaration mentioned, but such nuisance does not necessarily arise from the thing so mentioned itself, but only from the use made of it, it is not sufficient to shew that the thing belongs to the defendant, but he must be shewn to be answerable for the use so made of it, unless where the thing is of such a nature that the mere statement that it belongs to the defendant itself implies that he is also the party using it.

That in order therefore to render the defendant liable for the nuisances complained of in the present case, it ought to have been stated or shewn either that the defendant was in possession of the drains and sewers, so that he might have had some control over the use made of them, or that the passing and flowing through the same of the soil, filth and water was occasioned by the use made or permitted to be

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made of them by the defendant, and it is consistent with the said declaration, that the flowing through of such soil, filth and water may have been occasioned by the wrongful act of third persons, or other causes for which the defendant is not answerable, and it is also consistent with the said declaration that the said drains and sewers were constructed upon the defendant's premises by a tenant to whom the defendant had demised the same during the continuance of such demise.

*Cur. adv. vult.*

Lord DENMAN C. J., in Trinity Vacation (June 25,) delivered the judgment of the Court as follows :—This was an action for a nuisance to the plaintiff's lands by reason of the foul state and bad repair of drains of which defendant is the owner and proprietor, situate on his land, adjoining that of plaintiff, and which it was alleged that defendant, as such owner thereof, ought to repair.

The plea was demurred to, but the defendant took exceptions to the declaration. It charges no act on the defendant, either of making or continuing the nuisance. It merely states him to be the owner and proprietor of the drains, and seeks to cast upon him as such a legal obligation to make good the damage ensuing to his neighbour from their foul condition. There is no authority in support of such a claim, but several against it: *Brent v. Had-don* (a), *Chetham v. Hampson* (b), *Boyle v. Tamlyn* (c). The plaintiff also argued that the statement of defendant being owner or proprietor involved his being also occupier, for which he relied on some expressions used by the judges of this Court in *Rex v. Kerrison* (d), as shewing that an averment that a person is owner and proprietor is equivalent to averring that he is *seised*, which latter term was said in *Ballard v. Harrison* (e) *prima facie* to import that he is in

(a) Cro. Jac. 555.

(d) 1 Mau. & S. 439.

(b) 4 T. R. 318.

(e) 4 Mau. & S. 392.

(c) 6 B. & C. 337; S. C. 9 D. & R. 430.

possession and occupation. If ownership imports occupancy, and occupancy creates the duty, it would seem but reasonable to require occupancy to be pleaded in direct terms. But those expressions of Lord *Ellenborough* and the judges must be taken with reference to the cases in which they were employed, and do not shew more than this, that the averment was equivalent to averring that the party had the whole interest, not that he was seised, which is a word of technical import. We cannot consider it as an assertion of that actual occupation which is necessary to charge the defendant, but by no means follows as matter of law from his ownership or property in it.

The words themselves are in some degree ambiguous, but in whatever sense used they do not necessarily import occupation, and are used in this declaration evidently in contradistinction to *occupier*. *Tenant v. Goldwin* (a) was cited for the plaintiff, but plainly it was assumed in that case that defendant was occupier as well as owner of the adjoining house. The record is not set out; but the declaration averred that the defendant debuit and solebat to repair the wall separating his privy from the plaintiff's cellar, and that the filth came from it into the cellar for want of such reparation. *Holt* says, "it was the defendant's wall and the defendant's filth." The present declaration contains no averment that the defendant occupied, or that he did any act to the plaintiff's annoyance. *Payne v. Rogers* was also quoted from 2 *H. Bl.* 349. The language of the Court is not very clear in that case, but, if the marginal note may be taken as a fair representation of the effect of the decision, it will be hard to reconcile with *Chetham v. Hampson* (b)—"if the owner of the house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger for want of repair." But the Court intended, by the owner's being bound to repair, an obligation as between him and the occupier. The Chief Justice and *Buller J.* expressly hold the occupier *primâ facie* liable; if so, this

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(a) 1 Salk. 21, 360.

(b) 4 T. R. 318.

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declaration is defective in not shewing how that liability is taken out of the occupier, and transferred to the owner.

*Rex v. Pedly* (a) was an indictment against the owner of houses and privies, which had been built for the very purpose of being so used as to create a nuisance, unless the owner took effectual means to prevent it. Those means not having been adopted, the owner who received rents for both was held liable for the public nuisance, which arose, not from a single privy, but from a whole assemblage of them. The Court expressed no dissent from the cases cited, which were the same as have been adduced on this argument for the defendant. The declaration is bad.

G.

Judgment for defendant.

(a) 1 A. & E. 828; S. C. 3 N. & M. 627.



Saturday,  
 May 28th.

The QUEEN v. The Mayor, Aldermen and Burgesses of  
 YORK. (In re CLAYTON.)

*Held*, that the four attorneys of the Sheriff's Court of York, who, before the passing of the Municipal Corporation Act, had a monopoly of the office of attorney in the said court, were not, on other attorneys being admitted to practise in the court, by the operation of that act, entitled to compensation; because, although their office was an office of profit within 5 & 6 Will. 4, c. 76, s. 66, there had been no abolition of it, or removal from it, within the meaning of that section.

**MANDAMUS** to the mayor, aldermen and burgesses of the city and borough of York, as follows:—"Whereas the said city and borough of York is one of the boroughs mentioned in a certain act of parliament, made and passed, &c., intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales:" and whereas, &c., long before and until and at the time of the passing of the said act, and continually from thence until the 26th day of December, in the sixth year of the reign aforesaid, one *Robert Clayton*, of the said city and borough, gentleman, was an officer of the said city and borough, in a certain office of profit within the same, that is to say, the office of one of the attorneys of the Sheriff's Court of the said city and borough of York, and during all the time

aforesaid was and acted as one of the attorneys of the said Sheriff's Court, and received the fees and emoluments of and pertaining to such office; and whereas the said office was abolished under the provisions of the said act of parliament, and thereupon the said *R. Clayton* became entitled to have an adequate compensation, to be assessed by the council of the said city and borough and paid out of the borough fund, for the fees and emoluments of such office; and whereas the said *R. Clayton*, on or about the 8th day of November, in the year of our Lord 1836, did deliver to the then town clerk of the said city and borough a statement under his hand, setting forth the amount received by him in such office in every year during the period of five years next before the passing of the said act of parliament, on account of the fees, emoluments, profits and perquisites, in respect whereof he claimed such compensation, and containing a declaration that the same was a true statement according to the best of his knowledge, information and belief, and also setting forth the sum claimed by him as such compensation; which statement was laid before you the council of the said city and borough, who on or about the 5th day of January, in the year of our Lord 1837, determined thereon that such claim of the said *R. Clayton* for compensation for the loss of the said office of one of the attorneys of the said Sheriff's Court should be entirely disallowed; and thereupon the said *R. Clayton*, thinking himself aggrieved by such determination of the said council, did appeal to the Lords Commissioners of our Treasury against such determination, in pursuance of the provisions of the said act of parliament; and whereas the said Lords Commissioners of our Treasury, on or about the 30th day of November, in the year of our Lord 1838, made an order under the hands of three of them, and did thereby, in pursuance and under the authority of the said act, order and award to the said *R. Clayton* an annuity of 57*l.* for the loss of the fees and emoluments of the said office of one of the attorneys of the said Sheriff's Court, such annuity to

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commence from the time when such office was abolished under the provisions of the said act, and to continue for his life; and whereas the said annuity of 57*l.*, so awarded to the said *R. Clayton*, ought to be secured to him by bond or obligation under the common seal of the said city and borough in a sufficient penalty, conditioned for the payment to him, his executors, administrators or assigns, of such annuity, with all arrears thereof, if any, accrued due before the date of such bond, and which bond or obligation ought to be prepared and executed at the expense of the borough fund, and delivered to the said *R. Clayton* as the person entitled to such compensation according to the provisions of the said act of parliament; and whereas, &c. the said *R. Clayton*, since the making of the said order by the said Lords Commissioners of our Treasury as aforesaid, hath required and demanded of you the mayor, aldermen and burgesses of the said city and borough to prepare and execute under your common seal, and at the expense of the said borough fund, and to deliver to him a good and valid bond or obligation, in a sufficient penalty, conditioned for the payment to him and his assigns, during his natural life, of the said annuity of 57*l.* and of all arrears of such annuity which may have accrued due thereon to the time of the date of such bond or obligation, in pursuance of such order and award of the said Lords Commissioners of our Treasury, and of the directions of the said act of parliament in that behalf; but you the said mayor, aldermen and burgesses have wholly neglected and refused, and still do, &c., to prepare and execute any such bond, &c.: We do command you, &c. to prepare and execute, under the common seal, &c., to the said *R. Clayton* a good and valid bond in a sufficient penalty, conditioned for the payment to him and his assigns, during his natural life, of the said annuity of 57*l.* and of all arrears of such annuity, &c., as a compensation for the loss of the fees and emoluments of his office of one of the attorneys of the Sheriff's Court of the said city and borough, under the

provisions of the said act of parliament; or that you shall shew us cause to the contrary thereof, lest by your default the same complaint should be repeated to us; and how you shall have executed this our writ make known to us," &c.

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The return was as follows:—

"Easter Term, 3 Vict. 1840. The mayor, &c. humbly certify that the said court within mentioned, called the Sheriff's Court, of the said city and borough of York, hath from the time of the passing of the within mentioned act, intituled 'An Act to provide for the Regulation of Municipal Corporations in England and Wales,' continued and still does continue to be held, and that the same court was not in any manner abolished or altered in its jurisdiction by the said act. That the court hath always had and still hath jurisdiction of civil actions, real and personal, to any amount, in respect to causes of action arising within the said city and borough. That the suitors of the said court, before and at the time of the passing of the said act, and ever since, have been accustomed to prosecute and defend, and still do prosecute and defend, actions pending in the same court by their respective attornies. That before and at the time of the passing of the said act there were certain persons, that is to say, four persons, permitted to practise as attorneys of and in the said court, and that the within mentioned *R. Clayton* was one of the persons so permitted to practise as an attorney of and in the same court; and that the said *R. Clayton* and the said other attorneys, so practising in the said court as aforesaid, were respectively paid by the suitors of the same court by whom they were respectively retained and employed, and in no other manner did such attorneys of the said court, or any of them, derive any profit or emolument from their practice as such attorneys in the said court. That the said *R. Clayton* and the other attorneys of the said court were retained and employed to prosecute and defend actions in the same court

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at the option and according to the selection of the suitors of the said court; and that the said attorneys are still permitted to practise in the said court. That the said *R. Clayton*, ever since the passing of the said act, hath continued to practise as an attorney of and in the said court in like manner as he did practise before and at the time of the passing of the said act. That he the said *R. Clayton*, at the time of the passing of the said act, was not an officer of the said city and borough, nor was in any office of profit of or in the said city and borough, otherwise than as being an attorney of and practising in the said court in manner aforesaid, and that the said court hath not been abolished by the said act, and that the said *R. Clayton* hath never been deprived of the privilege of practising as such attorney of and in the said court, under the provisions of the said act. Wherefore the mayor, aldermen and burgesses," &c.

Plea in bar.—“ The said *R. Clayton*, by, &c., protesting that the said return to the said writ of mandamus, and the several matters in the said return mentioned, are wholly insufficient in law, for plea, nevertheless, in this behalf to the said return, the said *R. Clayton* says that the said city and borough of York is an ancient city and borough, incorporated under divers names of incorporation, and that the said court, in the said writ and return mentioned, is an ancient court of and belonging to the said borough, and that the officers of and practising in the same court have, from time whereof the memory of man is not to the contrary, until the making and passing and coming into operation of the said statute, made and passed in the sixth year of the reign of his late majesty King *William* the Fourth, been elected, appointed and removed by the said body corporate; and this the said *R. Clayton* is ready to verify; wherefore he prays judgment, and his damages and costs by him sustained, and that a peremptory writ of mandamus may be awarded to him in this behalf.”

Special demurrer and joinder.

Sir *F. Pollock* A. G. in support of the demurrer (a). Mr. *Clayton* has no claim to compensation under the Municipal Corporation Act; firstly, because he held no office within the meaning of it; secondly, because the office, whatever it was, is not abolished.

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The stat. 5 & 6 *Will.* 4, c. 76, s. 65, has pointed out the corporate offices, removal from or abolition of which are, under the 66th section, to entitle the holders to compensation. He held "no office of profit;" but merely enjoyed, by the permission of the corporation, a privilege of practising in the city court, which there was nothing to prevent the corporation from granting to as many other persons as they should think right. An ancient alderman, burgess or freeman might as well claim compensation.

The office is not abolished, but regulated only. The admission of a larger number of persons to exercise the same office as the prosecutor exercised is not an abolition of it within the enactments of the statute. If the old corporation might appoint more than four, there is clearly no right to compensation. It is nowhere alleged that the number of four is an ancient number. In *Rex v. Sheriffs of York* (b) it was said that the corporation could not admit a larger number than four to practise in the court. But, without putting the answer to the claim on that ground, it is sufficient to say that the case is not provided for by the statute. The 119th section regulates in futuro the proceedings of the borough court. It enacts that neither the registrar nor any officer of the court shall in future practise as an attorney in it, but it is silent as to any compensation to them for the restriction. There are

(a) Before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge*, Js. A rule, obtained in Trinity term, 1841, on the part of the prosecutor, to withdraw his plea and to set down the return for argument on concilium, was discharged

in the same term (June 12th), on the ground that the effect of it would be to deprive the defendants of the opportunity of taking the case to a court of error.

(b) 3 B. & Ad. 770.

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other similar provisions in the act as to existing privileges, such as the abolition, by sect. 123, of chartered exemptions from serving on juries, but no compensation is awarded. A freeman might as well claim compensation on the ground that his privilege of trading is now not confined to free-men.

Besides, it is a fatal objection to this writ that it is to command the payment of the sum awarded by the Lords of the Treasury on appeal to them. It is now settled that they have no jurisdiction where, as was the case here, there is a refusal by the corporation to award any compensation on the ground that the office is not such as to entitle the claimant to it. The mandamus ought to be to the corporation to assess compensation: *Reg. v. The Corporation of Warwick* (a).

Sir *W. W. Follett* S. G. The prosecutor of this mandamus held an office of profit within the meaning of the statute. If it was intended to be argued that he did not, the return ought to have traversed it; there is now but an argumentative denial of it. The language of the 66th section is, "every officer of any borough," not every officer of any corporation. The words are large, and intended by the legislature to be so, and they have received a liberal construction from the courts. In *Rex v. The Corporation of Bridgewater* (b), where a town clerk had usually acted as clerk to the justices, and after the passing of the Municipal Corporation Act was re-appointed town clerk, but not clerk to the justices, it was held that he was entitled to compensation for the loss of the emoluments he had before incidentally derived as clerk to the justices. The Court held unanimously that it was not necessary there should be an office strictly and legally speaking. But this is an office, and a mandamus would lie to restore the prosecutor to it,

(a) 10 A. & E. 386; S. C. 3 P. & D. 429.

(b) 6 A. & E. 339; S. C. 1 N. & P. 466.

if he were removed from it: *Rex v. The Corporation of York* (a), *Hurst's case* (b), *Parker's case* (c).

It was intended by the legislature that all persons holding office, whose profits should be abridged by the operation of the statute, should be entitled to compensation; *Rex v. Poole* (d), *Rex v. Bridgewater* (e). But it is said that either an entire removal from the office, or an entire abolition of the office itself, is necessary to entitle the holder to compensation. That this is not so, is decided by the case of *Rex v. Bridgewater* (e): there the applicant was town clerk before the act; he was town clerk after it; but, inasmuch as he had not all the profit he had before incidentally enjoyed, it was held he was entitled to compensation. So here the prosecutor's incidental profits are destroyed by the admission of others to perform the duties, in the performance of which he before had a monopoly.

The cases that have been alluded to are not analogous. A freeman is not an officer; an alderman holds no office of profit.

There are similar cases of attorneys who would be entitled to compensation if their sole privilege were abolished; ex. gr. the attorneys of the Court of the Marshalsea.

Sir F. Pollock A. G. replied.

*Cur. adv. vult.*

Lord DENMAN C. J., at the sittings after this term (June 20) delivered the judgment of the Court as follows:

This case comes before us on a demurrer to the plea to a return to a mandamus, and raises the question whether one *Robert Clayton* is entitled to compensation under the 66th section of the Municipal Reform Act, as the holder of an office abolished by that act. The writ recites that

(a) 3 B. & Ad. 770.

(b) 1 Lev. 75.


(c) 1 Ventr. 331.

(d) 7 A. & E. 730; S. C. 3 N. & P. 119.

(e) 6 A. & E. 339; S. C. 1 N. & P. 466.

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he was an officer of the city and borough in a certain office of profit within the same, that is to say, the office of one of the attorneys of the Sherff's Court of the said city and borough, and received the fees and emoluments pertaining to that office, "and that such office was abolished under the provisions of the act."

The return alleges that the court still continues to be held as before the act passed, and that *R. Clayton* continues to practise as an attorney in and of it; that there were four attorneys of the court, of whom he was one, who were employed by the suitors at their pleasure, and who derived no other profit than the fees and emoluments of such employment; and it denies that, except as such attorney, he was an officer of the borough or in any office of profit of, or in, the borough.

The plea merely alleges that the court was an ancient court of and belonging to the borough, and that the officers of, and practising in, it were immemorially, until the act came into operation, elected, appointed and removed by the body corporate.

It appears therefore that this was a borough court, the practitioners in which were limited in number, and were appointed and removable by the body corporate. We think these facts sufficient to constitute an attorney of the court an officer of the borough within the liberal construction which we have always given to those words in the clause in question. Indeed, the cases cited at the bar from *Levinz* and *Ventris* establish that the place of an attorney in courts like this is strictly an office, for restoration to which a mandamus will lie; and *Mr. Robinson* informs us that there are several instances in which the writ has issued for such a purpose. If the place is an office, it is certainly an office of that body in whose court the duties are performed, and by whom the officer is appointed and removable. Neither can there be any doubt that within the same construction it was an office of profit. Though no regular salary was incident to it, and no suitor was compelled to retain any one of

the four attorneys in particular, yet it is reasonable to presume that each attorney did in fact practise, and that from such practice profits arose referable only to the office which enabled him to earn them.

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But the question still remains, whether this office has been abolished? Now upon this head the return remains entirely unanswered, which avers that the court continues to be held, and that *R. Clayton* continues to practise as an attorney of and in it, as he did before and at the passing of the act. There is then no formal abolition; but it was argued that the 119th section of the act had worked its virtual abolition; that, whereas before the act passed he was one of four attorneys, who alone shared all the profits of the business transacted in the court, by that section it was provided that every attorney of the superior courts at Westminster, unless disqualified as therein provided, should have full liberty to practise in it; whence it was inferred that, with respect both to the tenure and the profits, it had ceased to be the same office as before, and that *R. Clayton's* present practice there was not as an officer of the court, but in virtue of his admission as an attorney of the superior courts. The answer to the last inference is short, that it is in direct contradiction to the averment in the return, and that it nowhere appears on the record that *R. Clayton* ever was or is an attorney of any one of the superior courts. Upon the first point we were pressed with our decision and the language we used in *Rex v. Bridgewater* (a). These have been repeatedly acted on; we see no reason to depart from them; and, if the present case can be brought within them, it must be governed by them. The question there arose as to the office of clerk to borough justices. That was not in itself a borough office, and was not abolished by the act, but it had been held by the claimant as incidental to a borough office or offices of common clerk, prothonotary and clerk of the peace, which he had held during good behaviour. These offices were

(a) 6 A. & E. 339; S. C. 1 N. & P. 466.



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abolished, and he was appointed, on the passing of the act, town clerk during pleasure, and in a few weeks after another person was appointed clerk to the justices. The claimant subsequently, upon the grant to the borough of a commission for a separate court of quarter sessions, was appointed clerk of the peace, with which office that of clerk to the justices was incompatible. Here there was such a total change in the nature and tenure of the offices existing before the act as amounted to an abolition.

In the present case, as regards *R. Clayton*, there is, for all that appears, no change; he is still an attorney of and in the court, and the jurisdiction of the court is the same. We do not know that he practises in it by any other right than that of his original appointment. Other attorneys may now by law practise in it, and perhaps in fact do; but perhaps also they do not, or the standing or experience which he has acquired may preserve his former practice unimpaired, or the business may have so increased by the opening of the court as to countervail the loss to him which the competition of other attorneys may occasion. All these circumstances are left in uncertainty upon the pleadings. At first sight they might seem immaterial, and to bear only on the amount of compensation, not the right to it, with which alone we have to do. But where there is no formal abolition or removal, where the office in the individual remains, and the individual remains in the office, he cannot make out the substantial abolition or removal on which he relies without shewing *de facto* that change of circumstances which he says amounts to abolition or removal. If without this we were to hold that the office is abolished in this case, we must be prepared to hold also that the 119th section has deprived the corporation of the power of appointing any more attorneys of the court. Now this would be contrary to the words and to the spirit of the section. The result is that the office remains with a value most probably much diminished; and this is the case in which the

statute has not provided a compensation for the officer.  
Our judgment therefore must be for the defendants.

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G.

Judgment for defendants.

## STOCKBRIDGE v. SUSSAMS.

DEBT for work and labour, &amp;c.

Plea. Set-off for goods sold and delivered.

Replication. That the plaintiff *never* was indebted in manner and form as the defendant hath by his plea above thereof alleged. Conclusion to the country, and issue thereon.

At the trial, before Gurney B. at the last Surrey spring assizes, the plaintiff was allowed to give evidence of payment in reduction of the set-off. The plaintiff obtained the verdict, and the learned judge granted a certificate for speedy execution. Judgment having been signed, and the goods of the defendant having been taken in execution,

Monday,  
May 23rd.

Under a replication that the plaintiff "*never* was indebted in manner and form" as alleged in a plea of set-off, evidence of payment is inadmissible.

*Wallinger* in Easter term last, on the authority of *Brown v. Daubeny* (a), obtained a rule to shew cause why the verdict should not be set aside, and a new trial had, and the judgment vacated and the execution withdrawn, on the ground that the evidence of payment was not admissible under the issue on the replication of "*never* indebted."

*Platt* now shewed cause. The new rules of pleading do not apply to replications, therefore this replication cannot be affected by those rules which exclude evidence of payment under a *plea* of "*never* indebted." Independently of the new rules, *nunquam indebitatus* is equivalent to *nil debet* in a replication, for the common form of replication is, "*was not nor is indebted,*" which must mean "*never*

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indebted." If the replication had used the words, "was not nor is indebted" instead of "never indebted," it has been held that evidence of payment would have been admissible; *Jackson v. Robinson(a)*. But, in truth, "never indebted" means merely "not in manner and form as alleged," that is, at the time of the commencement of the suit, so that proof of payment is in direct support of the replication.

*Wallinger* contra was not heard.

PATTESON J.—The argument that "never indebted" means not indebted at the time of commencing the action, because it traverses the being indebted in the manner and form alleged in the plea, would go to shew that payment should be proveable, under "never indebted" in a plea. By the new rules the phrase "never indebted," when it is used in a plea, has certainly not the meaning contended for, and I do not see why it should have one meaning in a plea and another in a replication. This is an attempt to read "never" as "not." The plaintiff has precluded himself from proving his payment by the form he has used. If he had used the old form he would have avoided the difficulty.

WILLIAMS and COLERIDGE Js. concurred.

D.

Rule absolute.

(a) 8 Dowl. P. C. 622. The Court in Easter term last (May 2d), same point was decided by this in *Grover v. Price*.



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Thursday,  
June 23.

## GARDNER v. M'MAHON.

**LIMITATION** of actions. Debt for work and labour, and on an account stated. Pleas, nunquam indebitatus, payment, and actio non accrevit infra sex annos. Issues joined thereon.

At the trial before *Patteson, J.*, at Westminster, at the sittings in Michaelmas term, 1841, the plaintiff had a verdict for 176*l.* 7*s.*, subject to leave reserved to move to enter a nonsuit, on the ground that the following letter, written by the defendant to the plaintiff was insufficient to take the case out of the operation of the Statute of Limitations. It was written before six years had elapsed from the accruing of the debt, which was in 1830 and 1831. The letter was dated October 28th, 1835.

"SIR.—Mr. *Anderdon* has been so obliging as to mention what passed between you and him a few days ago, which is the occasion of my troubling you with this letter.

I do not desire that you or any other of my creditors should lose what I owe them; on the contrary, it is very much my wish not only to pay my debts but interest upon them if I can. As you have mentioned to Mr. *Anderdon* the Limitation Act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever amount is due to you. To pay you now or within the year I am utterly unable; I really have not, as you imagine, received 600*l.* for the proceeds of the map, nor anything like that sum,

A letter written before the expiration of six years from the accruing of the debt, containing the following passages, held to take the case out of the Statute of Limitations, "I do not desire that you or any one of my creditors should lose what I owe them; on the contrary, it is very much my wish, not only to pay my debts but interest upon them if I can. As you have mentioned to Mr. *Anderdon* the Limitation Act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note to pay the amount that

is due to you. To pay you now or within the year I am utterly unable I really have not as you imagine received 600*l.* for," &c. "It is of course indispensable that the exact sums I owe you should be fixed, whether you accept my note or not." (The letter then stated several objections to the amount of the claim) "Under these circumstances you will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow the amount from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible and thankful for the forbearance you have shewn; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained."

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the subscribers in the West Indies, with only few exceptions, having failed to pay their subscriptions. It is of course indispensable that the exact sum I owe you should be fixed, whether you accept my note or not. I have clearly shewn you, in a former letter, that your account is not in accordance with the estimate upon which you agreed to do the work; that estimate, I again say, I have almost a distinct recollection of having, at your request, returned to you, in order that you might make a copy for yourself; the amount of it, exclusive of the extra charges mentioned in your account, was a sum, as nearly as I can recollect, between 120*l.* and 130*l.* Now, if you really cannot produce the original estimate, or the rough draft of it, it certainly is reasonable that some (and considerable) deductions should be made from the charges. It is impossible not to see the necessity for this if you refer to the estimate you gave in, and which I still have, when it was contemplated to publish upon eight sheets of copper, and compare that estimate with the charges you have made when only four sheets of copper were used, and a proportionate quantity of paper. This being the case, the expenses would of course be reduced nearly one half, as you yourself said at the time, and as your missing estimate afterwards clearly shewed; under these circumstances you will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount; or, if it be possible, to borrow it from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible and thankful for the forbearance you have shewn; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained.

(Signed.)

P.S.—I have referred to the estimate you sent me when

it was designed to publish upon eight sheets of copper, the expense was then to be . . . . . £242 5 0

Your charges (exclusive of extras), when only four sheets of copper, and half the quantity of paper were used, amount to 234 12 0

Making a difference of . . 7 13 0

I put it to yourself can this be right?"

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*Cowling*, in the same term, having obtained a rule nisi accordingly,

*Kelly* and *Barstow* shewed cause. The letter contained a distinct admission of a debt being due, and the assertion in it that not so much is due as is demanded will not prevent the implication by law of a promise. On that point *Colledge v. Horn(a)* and *Bird v. Gammon(b)* are decisive authorities. *Morrell v. Frith(c)* will be principally relied on by the defendant, but there the debt was not distinctly admitted. Besides, in this case the statute had not run when the letter was written; the plaintiff was therefore not then barred, and, even if the promise were conditional, it would not be necessary to shew the condition performed, though it would, if a conditional promise were made after the effluxion of the period of limitations. But the promise is not conditional; the only part of the letter which is ambiguous is that where it is proposed to give a note. The offer to give a valid security might be conditional without destroying the effect of the previous unqualified admission of the debt.

*Cowling* contra. The only question is on the construction of the letter. It is now settled, that to take a case out of the statute there must be a new promise; *Tanner v.*

(a) 3 Bing. 119; S. C. 10 Moore, 431.

(c) 3 M. & W. 402.

(b) 3 Bing. N. C. 883; S. C. 5 Scott, 218.

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*Smart(a)*. There must be all the ingredients of a promise in the writing, though, if there be a distinct acknowledgment, there need not be a promise in terms, for the law will imply a promise, but the law will make the implication only if there is nothing to rebut it in the acknowledgment itself. If there be a conditional promise in terms, the law cannot imply an unconditional promise. If there were an admission of a debt, with a direct declaration that the writer would never pay it, the law could not imply any promise at all. It makes no difference whether the promise is made before the period of limitations has expired or after that time. *Colledge v. Horn(b)* is a case that goes to the verge; it was decided shortly after *Tanner v. Smart(a)*, which was not adverted to in the argument or judgment. In *Bird v. Gammon(c)* there was a distinct promise to pay. A distinct acknowledgment of some debt, a jury determining the amount by evidence, may be sufficient; *Hartley v. Wharton(d)*; but that is not the case here, all that is in the nature of a promise is in futuro. The defendant says, if such an offer is made as is satisfactory to him, he is ready to put it out of his power to plead the statute, or to give a note payable at some time not named. That the letter was not meant to be an unqualified admission of a debt is shewn, not only by the objections made to the amount of the claim, but also by the allusion to a future readiness to debar the writer of the benefit of the statute, and his assertion of his total present inability to pay the debt due. To decide his acknowledgment to be sufficient, the Court must go much further than any decided case since *Tanner v. Smart(a)*. Before that case the greatest uncertainty prevailed as to what was sufficient to take a case out of the statute. *Buller J.* said, in *Lloyd v.*

(a) 6 B. & C. 609; S. C. 9 D.  
& R. 549.

(b) 3 M. & W. 402.

(c) 3 Bing. 119; S. C. 10 Moore,  
431.

(d) 3 P. & D. 529.

*Manne*(a), "the slightest acknowledgment has been held sufficient to take a case out of the statute"(b).

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LORD DENMAN C. J.—The question is, does this letter contain an acknowledgment of a debt. I think it does. The defendant speaks distinctly of his wish to pay the debt, and to deprive himself of the means of pleading the Statute of Limitations. The creditor had a right to take this as a promise and rely upon it. I think that the latter part of the letter does not contain anything which ought to qualify the promise which the law would draw from the previous acknowledgment. There is certainly some ambiguity in the defendant's language, which admits the argument, that the writer meant to make a promise to pay, or give a note, conditional on his being satisfied as to the amount due; but I think the acknowledgment of a debt stands independent of any qualification in the latter part of the letter. Whichever way this case is decided, it will probably lead to comment. Ambiguous terms ought to receive the construction which suggests itself on taking the whole document together, and I think the proper construction of this letter is, that the writer meant to admit some debt to be due, and to deprive himself of the power of pleading the Statute of Limitations as an answer to it.

PATTESON J.—I thought at the time, and I still think the letter sufficient to take the case out of the Statute of Limitations. (His lordship then expressed the same reasons as above given by Lord Denman C. J., and added): The observations in the earlier part of the letter seem to be nothing but proposals for settling the amount due. Possibly an action would not at once lie for not giving a note, because it is not stated what is the amount due, but that does not destroy the effect of the acknowledgment.

(a) 2 T. R. 762

(b) *Waters v. Earl of Thanet*,

*ante*, 166; *Poynder v. Bluck*, 5

*Dowl. P. C.* 570, were also adverted to.



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WILLIAMS J.—*Colledge v. Horne*(a) is a distinct authority that it is not necessary there should be an acknowledgment of any specific sum being due. It is sufficient if there is a distinct acknowledgment of a debt. It is in vain to expect to lay down a rule which shall govern all the cases.

WIGHTMAN J.—I think the acknowledgment of a debt is unqualified, and I do not find any condition stated to the payment. A note is mentioned, it is not said for what amount it is proposed to make it; there is a proposal to pay by a note, but there is no restriction to that mode only.

G.

Rule discharged.

(a) 4 Bing. 119; S. C. 10 Moore, 431.

JACKSON and another, Assignees of FRANKS, an Insolvent,  
v. THOMPSON(b).

Under 1 & 2  
Vict. c. 110,  
s. 59, a voluntary assign-  
ment of all his  
effects, within  
three months  
before the im-  
prisonment of  
the assignor,  
is fraudulent  
and void,  
though made  
for the benefit  
of all his cre-  
ditors.

Certified co-  
pies, upon  
parchment, of  
the vesting or-  
der, and of the  
appointment

TROVER. The 1st count of the declaration laid the possession of the goods in *Franks* and charged a conversion before *Franks* subscribed his petition to the Insolvent Court, and before the plaintiffs became his assignees. The 2nd count laid the possession in the plaintiffs as assignees of the insolvent.

Pleas:—1. Not guilty.

2. That plaintiffs were not assignees.

3. As to the 1st count, that *Franks* was not possessed.

4. As to the same count, that the conversion took place before *Franks* subscribed his petition, and before the plain-

(b) Decided in Hilary Vacation (February 1st, 1842).

of assignees, purporting to be sealed with the seal of the Insolvent Court, and to be certified by the deputy of the provisional assignee as follows:—"G. C. Deputy for the Provisional Assignee, in whose custody such order is," are sufficient proof of such orders, without proof of the appointment of the deputy either generally or that he was deputy for the purpose of making such copies.

tiffs became assignees, and that the defendants converted by the leave and license of *Franks*.

5. As to the same count, that the conversion took place after *Franks* had subscribed his petition, and that the defendants converted by the leave and license of the plaintiffs as assignees.

6. As to the 2nd count, that the plaintiffs as assignees were not possessed.

7. As to the same count, the leave and license of the plaintiffs as assignees.

Replications. Issue joined on the 1st, 2nd, 3rd, and 6th pleas.

To the 4th plea, that before the leave and license in that plea mentioned was given by *Franks*, and within three months before the commencement of the imprisonment of *Franks*, for his discharge from which he petitioned the Insolvent Court, to wit, on the 24th May, 1839, by an indenture then made between *Franks* of the one part, and the defendant of the other part, *Franks*, voluntarily, and contrary to the form of the statute in such case made, conveyed and assigned the goods in the first count mentioned to the defendant upon certain trusts to and for the use and benefit of the defendant, then being a creditor of *Franks*, and of other persons, creditors of *Franks*, who should become parties to the indenture, and *Franks* afterwards and before the leave and license in the 4th plea was given, to wit, on the day and year aforesaid, voluntarily and contrary to the form of the statute, delivered and made over the said goods, in the 1st count mentioned, to the defendant in pursuance of the indenture, and upon the trusts and for the purposes aforesaid, which indenture, assignment, delivery, &c. were by force of the statute fraudulent and void as against the plaintiffs as assignees; and *Franks* afterwards and before he subscribed his petition, and before the plaintiffs were assignees, and before the committing of the grievances in the first count mentioned, to wit, on the day and year aforesaid, for the purpose of giving effect

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to the voluntary fraudulent and illegal indenture, assignment, delivery, &c., and for no other purpose, gave to the defendant the leave and license in the first count mentioned.

To the 5th and 7th pleas, *de injuriâ*, &c.

Rejoinders. As to the replication to the 4th plea, that *Franks* did not, for the purpose in that replication mentioned, give to the defendant the leave and license in the 4th plea mentioned. Issue thereon.

Issue on the replications to the 5th and 7th pleas.

The cause was tried before *Gurney B.* at the London sittings after Michaelmas term, 1840. It appeared that on the 24th May, 1839, *Franks*, the insolvent, who was then a tradesman in embarrassed circumstances, by indenture of that date, between *Franks* of the first part, the defendant, one of his creditors, of the second part, and such other creditors of *Franks* as should execute the indenture of the third part, assigned to the defendant all his property, except leasehold, in trust to carry on his trade for the benefit of all his creditors. The deed was executed by *Franks* and defendant only. In the following month *Franks* was arrested for debt. Shortly after his arrest he filed his petition to the Insolvent Court, and in September of the same year the plaintiffs were appointed his assignees.

The principal question was whether the above indenture of assignment to the defendant, having been executed within three months before the insolvent's arrest, was not voluntary, and void within 1 & 2 *Vict. c. 110, s. 59(a)*.

(a) The 59th section is as follows:—"And be it enacted, that if any such prisoner shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatso-

ever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed, and is hereby declared to be, fraudulent and void, as against the provisional or other

Conflicting evidence was given upon the question whether the deed was executed by the insolvent voluntarily or under pressure from his creditors. The learned judge told the jury that he considered the deed to be voluntary and void, but left it to the jury to say whether it was voluntary or not.

A question also arose on the admissibility of the evidence to prove the vesting order and the appointment of the plaintiffs as assignees. A certified copy of each order, on parchment, was produced, purporting to be sealed with the seal of the Insolvent Court, and signed "*George Clarke*, Deputy for the Provisional Assignee, in whose custody such order is." It was objected that the copies were not evidence, under 1 & 2 *Vict. c. 110, s. 46*, without proof of the appointment of *Clarke* as deputy for the provisional assignee, or proof at all events that he was "deputy appointed for that purpose." The learned judge admitted the evidence.

The jury found that the assignment was voluntary, and returned a verdict for the plaintiffs.

A rule nisi for a new trial having been obtained in the following Hilary term,

*Platt, Kelly and Peacock* shewed cause (a). The jury having found that the deed in question was voluntary, the Court must hold it to be void, within 1 & 2 *Vict. c. 110, s. 59*. In *Binns v. Towsey* (b), it was held that the assignment, made for the benefit of all creditors, but made with-


assignee or assignees of such person appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention of the party so convey-

ing, assigning, transferring, charging, delivering, or making over, or petitioning the said Court for his discharge from custody under this act."

(a) Before *Patteson, Coleridge*, and *Wightman Js.* in Hilary term, 1841 (Jan. 17).

(b) 7 A. & E. 869; S. C. 3 N. & P. 88.

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out pressure from them and without any new consideration, was fraudulent and void, within the 7 Geo. 4, c. 57, s. 32, which is in terms precisely the same with the section now under consideration; and this very deed has been held voluntary and void in *Thompson v. Jackson* (a). In *Davies v. Acocks* (b) the deed was executed under pressure from creditors, and was therefore held not voluntary, and the dicta in that case in support of an assignment, when made for the benefit of *all* creditors, are overruled by the decision in *Binns v. Towsey*. In *Owen v. Body* (c) it was held that an assignment for the benefit of all creditors, and authorising the trustees to carry on the debtor's trade, so that the subscribing creditors would become partners in the business was not valid. In *Knight v. Fergusson* (d) the assignment was supported on the ground that the assignee had given a valuable consideration for it.

The orders of the Insolvent Court were properly proved. The 46th section of the 1 & 2 Vict. c. 110, enacts, "That a copy of any order under this act vesting the estate and effects of any prisoner in the provisional assignee of the estates and effects of any insolvent debtors, or of the appointment, under the provision last hereinbefore contained, of an assignee or assignees of such estate and effects, such copy being made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose, indorsed thereon, and to be sealed with the seal of the said Court, shall in all courts and places, and without further proof, be recognised and received as sufficient evidence of such order and appointment respectively having been made, and of the title of the provisional assignee, and of such other assignee or assignees respectively, under the same." By sect. 105 also it is enacted that "a copy of such petition, vesting order, schedule, order of adjudication, and other orders

(a) 4 Scott (N. R.), 234.

(b) 2 C., M. & R. 461.

(c) 5 A. & E. 28; S. C. 6 N. & M. 448.

(d) 5 M. & W. 389.

and proceedings, purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy, &c. and purporting to be sealed with the seal of the said Court, shall at all times be admitted in all courts and places whatever, as sufficient evidence of the same, without any other proof whatever given of the same." They referred to *Delafield v. Freeman* (a) and *Hounsfield v. Drury* (b).

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*Hoggins* contra. The decision in *Thompson v. Jackson* (c) as to the voluntariness of this assignment is not conclusive, for additional evidence of pressure by creditors was given on the trial of this case. (He then referred to the evidence.) A mere request of a creditor without pressure is quite sufficient to support an assignment of this kind: *Mogg v. Baker* (d). The learned judge who tried this cause should therefore have directed the jury that this assignment was not voluntary. It is submitted also that the dicta, in *Davies v. Acocks* (e), that an assignment is valid, if made for the benefit of all creditors, ought to be supported; and *Tindal C. J.* in *Thompson v. Jackson* (c), does not treat those dicta as overruled by *Binns v. Towney* (f).

With regard to the evidence, proof should have been given that the person who certified the copies was deputy of the provisional assignee, for the statute says that copies made by the deputy appointed for that purpose, and properly sealed, shall be evidence without further proof. This does not imply that the mere statement in the copies themselves that they were made by the deputy is to dispense with proof that the person who made them was such deputy.

*Cur. adv. vult.*

(a) 6 Bing. 294.


(b) 11 A. & E. 98.

(c) 4 Scott (N. R.), 234.

(d) 4 M. & W. 348

(e) 2 C., M. & R. 461.

(f) 7 A. & E. 869; S. C. 3 N.  
 & P. 88.

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Lord DENMAN C.J. delivered the judgment of the Court as follows:—The question in this case was, whether an assignment of *all* his effects, made by *Franks* to the defendant for the benefit of *all* his creditors, was fraudulent and void as against his assignees under the Insolvent Act, 1 & 2 Vict. c. 110, s. 59, as being voluntary and made within three months before his imprisonment. The question of fact as to the deed being voluntary was left to the jury by the learned judge, with a strong intimation of his opinion indeed, but still leaving it to them to determine. They have found that it was voluntary, and we are satisfied with that finding.

It was however contended on the argument, that no assignment for the benefit of *all* creditors could be within the 59th section of the 1 & 2 Vict. c. 110, which contains the same words as section 32 of 7 Geo. 4, c. 57, the former Insolvent Act. This argument was founded on what fell from some of the judges in the case of *Davies v. Acocks* (a). But in *Bimms v. Towsey* (b) it was expressly held that such an assignment may be within that section. The other cases cited at the bar, in which such assignments were held good, particularly the case of *Knight v. Fergusson* (c), are distinguishable from the present, having either been obtained by the pressure of creditors, or for some new and valuable consideration, and so not voluntary.

We find also that this very deed, has been held to be fraudulent and void, within the meaning of the act above referred to, by the Court of Common Pleas.

Another objection was made at the trial, and on the argument, as to the proof of the vesting order, and the appointment of the plaintiffs as assignees. Certified copies of each, on parchment, were produced, purporting to be sealed with the seal of the Court, and to be signed "*George Clarke*, Deputy for Provisional Assignee, in whose custody such order is." Sections 46 and 105 were referred to, and

(a) 2 C., M. & R. 461.

(c) 5 M. & W. 389.

(b) 7 A. & E. 869; S. C. 3 N. & P. 88.

it was contended that the appointment of the deputy ought to be proved, or at all events that it should be stated that he was deputy appointed for *that purpose*, that is, for the purpose of making out such certificate. We are of opinion that there is nothing in this objection; that the act of parliament authorises the officer, in whose custody the document is, to certify by his deputy, and makes the certificate, purporting to be signed by the deputy, sufficient without further proof. The rule for a new trial must therefore be discharged.

D.

Rule discharged.

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The QUEEN v. The Mayor, Aldermen and Burgesses of  
NORWICH.

Wednesday,  
May 25th.

**KELLY**, in Hilary term last, obtained a rule calling upon the defendants to shew cause why a mandamus should not issue commanding them to execute a compensation bond, conditioned for the payment to Mr. *Beckwith* of an annuity of 469*l.* 12*s.* 9*d.* (together with all arrears thereof due) for the loss of the salaries, fees and emoluments, profits and perquisites of the several offices of town clerk, clerk to the visitors of lunatic houses, and clerk of the peace of the city and borough of Norwich, and of the *business connected with the several charities* lately under the management of the corporation of the city and borough.

Mr. *Beckwith* in 1834 was appointed common or town clerk, and also clerk of the peace for the city and county of Norwich, to hold during good behaviour. He also held the office of clerk to the visitors of houses for the re-

The town clerk of a borough had transacted the legal business of the corporation as charity trustees. He and his predecessors in office had usually transacted such business as incidental to their office. On the passing of 5 & 6 W. 4, c. 76, he was removed from the office of town clerk, and subsequently the new charity

trustees appointed under sect. 71, also removed him from their employment. The town council having awarded him compensation for the loss of his office of town clerk, but having refused compensation for the loss of his employment by the trustees, he appealed to the Lords of the Treasury, who awarded him compensation for such employment also.

*Held*, that the Lords of the Treasury had jurisdiction to award such compensation, because the transaction of the charity business formed part of the incidental profits of the office of town clerk, and the Lords therefore had entertained a question of amount only, and not a question whether the loss of any distinct office was a proper subject of compensation.



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ception of lunatics, as attached to the offices of town clerk and clerk of the peace. It was also part of his duty as town clerk, and had been part of the duty of his predecessors, to act as the attorney and solicitor for the corporation of Norwich, and to transact all *the legal and professional business* of the corporation, and of the several *charities* under their management, and the legal and professional business relating to the estates belonging to the corporation, and the estates vested in such corporation for the benefit of the said charities; and he and his predecessors in the office of town clerk were entitled to and received the perquisites, profits and emoluments accruing from the transaction of such business.

On the 1st of January, 1836, the council removed him from the office of town clerk, under the provisions of the 5 & 6 Will. 4, c. 76; and in pursuance of the provisions of that act he also ceased to be clerk of the peace for the city and county of Norwich on the 1st of May, 1836.

Mr. *Beckwith*, however, was still employed to transact the business of the borough charities by the members of the old corporation, who continued to be trustees of the charities for some time after the passing of the act, under sect. 71; but on the 27th of March, 1837, the Lord Chancellor appointed new trustees, who removed Mr. *Beckwith* from this employment.

On the 25th of May, 1836, Mr. *Beckwith* sent in his claim for composition to the town council. His claim was divided into four heads, viz. for loss of salary and fees as town clerk, and of the profits of the professional business done by him in consequence of his holding that office; loss of fees and profits as clerk of the peace; as clerk to the visitors of lunatic houses; and for loss of the business connected with the charities.

Mr. *Beckwith* included the emoluments arising from the professional business connected with the charities, although at the time of sending in his claim he was still in the employment of the charity trustees, because the business

transacted by him before the passing of the act was attached to his office of town clerk, and therefore, although he was still employed by the trustees after his removal from the office of town clerk, he considered his employment a new employment, held during pleasure only, and because, under the circumstances then existing, no leases could be granted by the trustees, and the emoluments of that business were much diminished.

On the 18th of November, 1896, the town council resolved that Mr. *Beckwith* was entitled to compensation in respect of each head of his claim, except the head relative to the business of the charities, and they awarded him an annuity of 365*l*. They refused him compensation for the loss of the business of the charities, on the ground that he had been re-appointed by the charity trustees after his removal from the office of town clerk.

Mr. *Beckwith* subsequently to his removal from the employment of the charity trustees renewed his claim, but without effect. He then memorialised the Lords of the Treasury, who held him entitled to compensation on all the heads of his claim, and awarded him compensation as follows;—

|                                                                                                                                                                                            |          |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| As town clerk, and clerk to the visitors<br>of lunatic houses, and for professional<br>business performed for the corpora-<br>tion, for loss of salary, fees and emo-<br>luments . . . . . | £. s. d. |
|                                                                                                                                                                                            | 174 12 3 |
| As clerk of the peace, for the loss of<br>fees and emoluments . . . . .                                                                                                                    | 211 0 2  |
| For the loss of the fees and emoluments<br>for professional business connected<br>with the charity estates . . . . .                                                                       | 84 0 4   |
| Amounting altogether to the annuity<br>mentioned in the rule . . . . .                                                                                                                     | 469 12 9 |

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Sir *W. W. Follett* S. G. and *W. H. Watson* now shewed cause. The Lords of the Treasury have no jurisdiction except as to the amount of compensation; they cannot take upon themselves to say whether an office or employment is the subject of compensation within 5 & 6 *Will.* 4, c. 76, s. 66: *Reg. v. The Corporation of Poole* (a); *Rex v. The Mayor, &c. of Bridgewater* (b). In the present case the Lords of the Treasury have assumed to decide that the claimant was entitled to compensation for his loss of employment as clerk and solicitor to the Norwich charities. If it were necessary, it might be clearly shewn that, even if the Lords had jurisdiction, their conclusion is wrong. The employment in question was in no way incident to that of town clerk, nor was it even an office. It is only the fees, &c. of "office" that can be made the subject of compensation within the 66th section.

Sir *F. Pollock* A. G. and *Kelly* contra. The compensation in dispute is not claimed in respect of any distinct office, nor have the Lords of the Treasury treated *Mr. Beckwith's* employment by the charity trustees as an office. That employment was a mere incident to the office of town clerk, and so it has been treated by the Lords, although they have, for the sake of clearness, made a separate minute of its emoluments. If the claimant had been still town clerk, he could not have made the present claim. The 66th section has always received a liberal construction, and includes not merely the strict fees of office, but all its collateral advantages. The Lords, with reference to those advantages incidental to the office of town clerk, have awarded a larger sum than the council was willing to pay, and have decided upon a question of amount and nothing more. *Rex v. The Mayor, &c. of Bridgewater* (b) is a decisive case in fa-

(a) 7 A. & E. 730; S. C. 3 N. & P. 119.

(b) 6 A. & E. 339; S. C. 1 N. & P. 466.

vour of the claimant. They then referred to *Reg. v. The Mayor, &c. of Norwich* (a).

*O'Malley*, on the same side, was not heard.

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LORD DENMAN C. J.—This case is substantially within the authority of *Rex v. The Mayor, &c. of Bridgewater* (b). The Lords of the Treasury had jurisdiction, if the question before them was one of amount only, and I think it was so.

PATTESON J.—This is within the *Bridgewater* case, and differs from the *Poole* case. In the *Poole* case the officer was appointed and was also removable at pleasure under a local act. The Municipal Corporation Act devolved the administration of that local act upon the council of the borough, and the officer, therefore, who was removed by the council, was removed under the provisions of the local act, and not of the Municipal Corporation Act; he might have been removed at any time, whether the Municipal Corporation Act had passed or not. But in the present case, if that act had not passed, Mr. *Beckwith* would in all probability have continued to transact the business of the charities. It arises from the Municipal Act itself that the charity trustees are separated from the corporation, and the consequence has been that Mr. *Beckwith* has lost an employment which was part of the usual profits of his office of town clerk.

WILLIAMS J.—As we have always given a liberal construction to the 66th section, it is not far-fetched or unreasonable to say that it is by his removal from his office of town clerk, under the Municipal Corporation Act, that Mr. *Beckwith* has lost his customary emoluments as solicitor to the charity trustees.

(a) 8 A. & E. 633.

(b) 6 A. & E. 339; S. C. 1 N. & P. 466.

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COLERIDGE J.—At first I was of a different opinion, but I now think the question before the Lords of the Treasury was one of amount merely. Suppose the charity clauses in the act to be omitted, then it will be evident that Mr. *Beckwith* was removed under the 66th section from his office of town clerk such as it was before the passing of the act. Then consider the case with reference to the charity clauses. It is evident that the effect of those clauses has been to change the office of town clerk. The profits of that office are no longer what they were, for it is a matter of accident now whether the charity trustees employ the town clerk or not. If Mr. *Beckwith* had been re-appointed town clerk, he might not have been continued in the employment of the trustees, and he would then have had a claim for compensation for the loss of part of his profits of office; though the office to which he had been so re-appointed would have borne the same name as formerly, the profits of it would have been diminished. On the other hand, suppose him not to be re-appointed town clerk, but to be employed by the trustees on the same footing as before, then the Lords of the Treasury would have had a right to say that, though he was entitled to compensation for the loss of his office of town clerk, he had been continued in one of his incidental employments, and therefore, that his amount of compensation as a removed town clerk would be reduced. In either case it would be the amount of his compensation that would come before them and with respect to one and the same office.

Rule absolute (a).

(a) It was intimated during the argument that, as no facts were in dispute, the parties desired to have the question settled on the rule without proceeding farther, if the rule should be made absolute.

D.

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## ATKINSON v. RALEIGH and others (a).

**CASE**, for having falsely and maliciously, and without reasonable or probable cause, caused and procured to be issued and granted a certain fiat in bankruptcy against the plaintiff.

Plea, not guilty. Issue thereon.

The declaration, after the other necessary allegations, proceeded thus:—"That such proceedings were thereupon had, that afterwards, to wit, &c. it was duly ordered, according to law and justice in that behalf, to wit, by the Court of Review, then having competent power and authority in that behalf, that the said fiat should be and the same then was rescinded and annulled, and the proceedings on the said fiat were thereupon then wholly ended and determined."

At the trial before *Erskine J.* at the Exeter spring assizes, 1841, a question arose upon the evidence, given on behalf of the plaintiff, to shew that the proceedings on the fiat had been determined, as alleged in the declaration. The plaintiff put in evidence an office copy order obtained from the Lord Chancellor's secretary of bankrupts. This order recited an order of the Court of Review that the fiat should be annulled, "if the Lord Chancellor should think fit," and then contained the Lord Chancellor's approval and confirmation of the order so recited. It was objected that this evidence did not support the allegation that the fiat was rescinded by the Court of Review, and a nonsuit was applied for. The plaintiff then applied to the learned judge to amend. The learned judge referred the question of

In an action on the case for maliciously suing out a fiat in bankruptcy, the usual allegation in the declaration, as to the annulling of the fiat, is not put in issue by the plea of not guilty.

*Quere*, whether under 1 & 2 Will. 4, c. 56, the Court of Review has concurrent authority with the Lord Chancellor to annul a fiat.

A declaration for maliciously suing out a fiat, alleged "that it was duly ordered, to wit, by the Court of Review, then having competent power and authority in that behalf, that the said fiat should be and the same was then rescinded and annulled, and

(a) Decided in Easter term last (April 28.)

the proceedings on the said fiat were thereupon wholly ended and determined."

*Held*, after verdict, that the declaration was good, as, even if no one but the Chancellor could annul the fiat, evidence that it was annulled by him would have supported the general concluding allegation, "that the proceedings were ended," which was independent of the preceding allegation as to the Court of Review.

*Quere*, whether a judge at the trial can, in case of variance, make an amendment, which will have the effect of defeating a motion in arrest of judgment, or for judgment non obstante veredicto.

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amendment to the Court, saying that if the Court should be of opinion that the objection was good, and could be removed by amendment, and that he ought to have amended, then the amendment was to be taken to have been made at the trial. The case went to the jury, and the plaintiff had a verdict, subject to a motion to enter a nonsuit.

A rule nisi for a nonsuit having been obtained accordingly in the following Easter term, and also a rule to arrest the judgment, on the ground that the declaration did not allege that the fiat had been rescinded by the Lord Chancellor, who was the only competent authority.

*Erle and Barstow* now shewed cause. The rule for a nonsuit on the ground that the mode of annulling the fiat, as proved, did not correspond with the mode of annulling it, as stated in the declaration, must be discharged, for the plea of not guilty puts nothing in issue but the wrongful act, which is the maliciously suing out of the fiat. In *Drummond v. Pigou* (a), which was an action for maliciously proceeding to outlawry, it was held that the general issue put in issue nothing but the existence of reasonable and probable cause, and not the reversal of the outlawry. In *Watkins v. Lee* (b), an action on the case for malicious arrest, the declaration averred that the defendant did not prosecute his suit, but voluntarily suffered the same to be discontinued for want of prosecution thereof: and it was held that the averment of the discontinuance of the suit was a material allegation, and that the plea of not guilty admitted the discontinuance. [Lord Denman C. J. We think the annulling of the fiat was not in issue.]

2. The declaration is good. Under the Bankruptcy Act, the 1 & 2 Will. 4, c. 56, s. 2, the Court of Review has concurrent jurisdiction with the Lord Chancellor to annul fiats. It may be said that the 19th section of the

(a) 2 Bing. N. C. 114; S. C. 2      (b) 5 M. & W. 270.  
 Scott, 228.

above act confers jurisdiction for this purpose on the Lord Chancellor only, but the same jurisdiction is conferred on the Court of Review by the very general provisions of the 2d section, and in *Ex parte Brittain* (a) the Lord Chancellor himself clearly intimated his opinion that the jurisdiction was concurrent. Even, however, if the Court of Review had no jurisdiction, the declaration is not bad; for the allegation that the Court of Review ordered the annulling of the fiat is made under a videlicet, and the general allegation at the end of the declaration, "that the proceedings on the said fiat were thereupon then wholly ended and determined," is sufficient after verdict.

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*Bompas* Serjt. and *C. Saunders* contra. It was necessary that the declaration should state that the fiat had been annulled by competent authority: and the fiat could not be annulled by any other authority than that of the lord chancellor. The declaration, therefore, is at present defective, and the Court will not allow such an amendment as will make a bad declaration good. [*Patteson* J. The amendment might certainly have been made on summons before trial.] Before trial a judge may make new issues and allow the pleadings to be altered at his discretion, but his authority at the trial is defined by statute. In *Whitworth v. Hall* (b) it was held that in an action for maliciously suing out a commission of bankrupt it must be averred and proved that the commission was superseded before the commencement of the action, and that, if this fact be not proved, the plaintiff ought to be nonsuited, though the fact is not averred in the declaration. So in *Webb v. Hill* (c), in a declaration for malicious arrest, it was alleged that the defendants did not prosecute their suit, but therein failed, and thereupon it was considered that they should take nothing, &c. and the plaintiff go thereof without day "prout patet per recordum." It was

(a) 3 Mont. & Ayr. 345.

(c) 3 C. & P. 485

(b) 2 B. & Ad. 695.



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held that this allegation was not proved by the production of a rule to discontinue on the payment of costs, and the proof of payment of such costs, and also that the Court could not reject the allegation of the judgment of non pros, as, without that, it would not be shewn how the suit was terminated, and that the variance was not amendable under the 9 Geo. 4 (a).

There are two reasons why the Court will not amend in this case; first, the allegation in question was most material to the merits, and, secondly, the amendment of it will defeat the rule for arresting judgment. [*Wightman J.* Suppose the declaration had alleged generally "that the fiat was annulled" without more.] It would be bad in arrest of judgment. [*Wightman J.* It seems from 1 *Wms. Saund.* 228 a. n. (1), that even the want of such an averment altogether is cured after verdict.]

Lord DENMAN C. J.—In the first place, it is clear from *Drummond v. Pigou* (b), that the allegation in the declaration as to the end and determination of the proceedings in bankruptcy was not in issue under the plea of not guilty. The manner of their determination, therefore, whether by the Court of Review or the Lord Chancellor, becomes immaterial, and the ground of nonsuit fails. But the question remains whether the allegation itself is so defective as that judgment ought to be arrested. It is said that the declaration alleges the proceedings under the fiat were ended by the Court of Review; that the Court of Review had no authority to end them, and that the Lord Chancellor only had such authority. If the proceedings could be ended by no authority than that of the Lord Chancellor, the concluding averment as to the determination of them is so general that proof that the Lord Chancellor determined them would support the averment. If that be so, the declaration at this stage is good enough. What is said in the

(a) *Reg. v. Hewins* (9 C. & P. 786) was also cited.

(b) 2 Bing. N. C. 114; S. C. 2 Scott, 228.

former part of the declaration as to the Court of Review is laid under a *videlicet*, and it is not said that the proceedings were determined by any thing done in that Court, but the concluding averment, "and the proceedings upon the said fiat were thereupon then wholly ended and determined," is a separate averment.

As I think the declaration is not bad in arrest of judgment, it is not necessary to consider whether it would be right to make such an amendment as would have the effect of curing a bad declaration. If the question arose, it might require serious consideration whether our power of amendment could be carried to that extent.

PATTERSON J.—The case cited shews that the allegation as to the determination of the proceedings was not in issue. Whether, therefore, the evidence did or did not tally with the record is of no consequence. If the question had arisen, it would require great consideration whether a declaration should be amended in such a way as to defeat a motion in arrest of judgment, as the object of the provisions for amendment appears to have been to save a non-suit.

With regard to arresting the judgment, I think the allegation as to the mode of determining the proceedings may be rejected after verdict. Suppose then the declaration to have alleged nothing more than that the proceedings were ended, surely evidence that the proceedings were ended by the Lord Chancellor would have supported the declaration. It can be no objection, therefore, in arrest of judgment, even if the Court of Review had no power to end the proceedings, that, in addition to the general allegation that the proceedings were ended, without saying how, there is also an erroneous allegation that they were ended by the Court of Review.

WILLIAMS J.—The general issue put nothing in issue but the gravamen, which was the maliciously suing out the

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fiat, and the inducement is admitted. What was said by *Alderson B.* in *Heming v. Power (a)*, with reference to a similar objection, may also be applied here, "if the averment was material it was admitted by the pleadings; if it was immaterial, it was not necessary to be proved."

I think the allegation as to the determination of the proceedings is sufficient after verdict.

WIGHTMAN J. —I am of the same opinion on both points. Since the new rules the general issue puts nothing in issue but the wrongful act, which was the maliciously suing out of the fiat, and *Drummond v. Pigou (b)* has decided the point.

As to the sufficiency of the declaration after verdict, the declaration does not tie the plaintiff down to the statement that the Court of Review determined the proceedings, for there is another statement "that the proceedings were determined," which is altogether independent of what is said respecting the Court of Review; the declaration, after alleging the order of the Court of Review, does not say that the proceedings were determined "thereby." The sufficiency of a general allegation of this kind is pointed out by *Wood B.* in *Gadd v. Bennett (c)*. It appears also from the passage in 1 *Wms. Saund.* that, after verdict, the declaration would have been sufficient, even if the general allegation had been omitted altogether.

D.

Rule discharged.

(a) 11 Law J. (N. S.) Excheq. 323.

(c) 5 Price, 540.

(b) 2 Bing. N. C. 114; S. C. 2 Scott, 228.



1842.

Monday,
June 6th.

SILVERSIDES v. The QUEEN.

AT the quarter sessions held in April last for the borough of Portsmouth, the plaintiff in error pleaded guilty to the following indictment :

The first count alleged that *Silversides*, on the 19th January, 1842, with force and arms, at, &c., unlawfully, willingly and knowingly had in the custody, possession and keeping of him the said *Silversides*, certain naval stores, marked with the mark usually used to and marked upon such like naval stores of our Lady the Queen, that is to say, 19 lbs. weight of copper spike nails, each of the said spike nails being marked with the broad arrow and being new, he the said *Silversides* not being a contractor with the principal officers or Commissioners of our said Lady the Queen, of the navy, ordnance or victuallers, for the use of our said Lady the Queen, or employed by any contractor with the principal officers or Commissioners of our said Lady the Queen, of the navy, ordnance or victuallers, for the use of our said Lady the Queen, and not being a contractor with the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, for the use of our said Lady the Queen, or employed by any contractor with the Commissioners for executing the office of Lord High Admiral aforesaid, for the use of our said Lady the Queen, to make any stores of war or naval stores whatsoever, to the diminution of the naval stores of our said Lady the Queen, against the form of the statute in such case made and provided, and against the peace, &c.

Second count: that the said *Silversides*, on the said 19th day of January, 1842, with force and arms, at, &c., unlawfully did conceal certain other naval stores, marked with the mark usually used to and marked upon such like naval

1. An indictment, under the 39 & 40 Geo. 3, c. 89, alleged that *A.*, on the 19th day of May, 1842, not being a contractor, &c., had in his possession certain naval stores:—*Held*, that the date given applied to the allegation that *A.* was not a contractor, as well as to the allegation that he had possession of the stores, and therefore that it was sufficiently averred that he was not a contractor at the time of such possession.

2. The offence charged in this indictment is not punishable with hard labour.

3. Where a person has been erroneously sentenced at quarter sessions to imprisonment and hard labour, this Court, after reversing the judgment, in

error, has no alternative but to discharge the prisoner.

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stores of our said Lady the Queen, that is to say, 19 lbs. weight of other copper spike nails, each of the last mentioned spike nails being marked with the broad arrow, and being new, to the diminution of the naval stores, &c. (as in the first court.)

Silversides was sentenced to imprisonment and hard labour for twelve months.

A writ of error was brought on this judgment. The errors assigned were, that the indictment did not shew that *Silversides* was not a contractor, &c. at the *time* when he had the naval stores in his possession.

That the second count did not allege at all that *Silversides* was not such a contractor.

That the Court had no jurisdiction to punish *Silversides* with hard labour.

Poulden, for the prisoner. 1. The indictment is bad.
 2. The judgment is erroneous.

1. The second count is clearly bad, because it does not negative at all that the prisoner was a contractor. The first count is also bad for the same reason, for this count does not contain a proper negative of the prisoner being a contractor. The charge consists of two material allegations, the possession of the stores and the not being a contractor. Each of these allegations should be made with a proper averment of time. "It is laid down as an undoubted principle in all the books that treat of this matter, that no indictment whatever can be good without precisely shewing a certain year and day of the material facts alleged in it:" *Hawk. P. C.* bk. 2, c. 25, s. 77; 1 *Chitt. Cr. L.* 219 (2d ed.); *Rex v. Holland* (a), *Reg. v. Brownlow* (b). The first count states the 19th of January to have been the day on which the prisoner had possession, but does not say he was not "*then*" a contractor.

(a) 5 T. R. 607.

(b) 3 P. & D. 52.

Shepherd contra was then called upon to answer this objection. The passage objected to in the first count is one connected sentence, and, if the words are transposed will be found to state clearly that the prisoner on a certain day, not being a contractor, had the stores in his possession. The date applies, therefore, to both the material facts. [Lord Denman C. J. We are of that opinion.]

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Poulden. 2. The judgment is erroneous, for the Court had no right to sentence the prisoner to hard labour. At common law, a person convicted of misdemeanor could not be punished by imprisonment and hard labour. It is true that, by 17 *Geo.* 2, c. 40, s. 10, the punishment of imprisonment and hard labour was imposed on the particular offence charged in this indictment. But this indictment is framed on the 39 & 40 *Geo.* 3, c. 89, and it was held in *Rex v. Bridges* (a), that by this statute the power of so punishing the offence was taken away. By the 39 & 40 *Geo.* 3, every person who, not being a contractor, &c., shall have naval stores, &c. in his possession, shall be deemed a receiver of stolen goods, and be subject to transportation for fourteen years. It may be said that imprisonment with hard labour is imposed on receivers of stolen goods by 3 *Geo.* 4, c. 114. But this last mentioned statute, so far as it relates to the punishment for receiving stolen goods, is repealed by 7 & 8 *Geo.* 4, c. 27; and by 7 & 8 *Geo.* 4, c. 29, s. 54, receivers of stolen goods are guilty of felony, and liable to transportation and other punishments, but not to imprisonment with hard labour.

Shepherd contra. The 7 & 8 *Geo.* 4, c. 27, is relied upon as repealing the act of 3 *Geo.* 4, c. 114, by which the prisoner might have been punished by imprisonment and hard labour. But the 2d section of the repealing statute excepts the present case by providing "that nothing in that act contained shall in anywise affect or alter such part of

(a) 8 East, 53.

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any act as relates to the Post Office, or to any branch of the public revenue, or to the naval, military, victualling, or other public stores of his Majesty, except the acts of the 31st year of *Eliz.* and of the 22d of *Car.* 2, which are hereinbefore repealed, or shall affect or alter any act relating to the Bank of England or South Sea Company." The power therefore of sentencing to hard labour a receiver of naval stores is still unrepealed. [*Poulden.* The excepting clause saves acts relating to the public stores, but the 3 *Geo.* 4, c. 114, was not such an act.]

Lord DENMAN C. J.—The only way in which it is contended that the sentence to imprisonment and hard labour can be supported, is by importing the statute 3 *Geo.* 4, c. 114 into the statute 39 & 40 *Geo.* 3, c. 89, on which the indictment is founded. The argument is, that the 39 & 40 *Geo.* 3 makes the receiver of public stores a receiver of stolen goods, and that the 3 *Geo.* 4 makes a receiver of stolen goods punishable by imprisonment and hard labour. But the 39 & 40 *Geo.* 3 does not merely make a receiver of public stores a receiver of stolen goods, it also imposes transportation as the punishment for the particular offence. However, without considering whether the punishment applicable to receivers of stolen goods in general, under 3 *Geo.* 4, was intended to supersede the punishment of transportation, specially imposed on the receiver of public stores under the former statute, it is enough to say that the 3 *Geo.* 4, c. 114, the very statute relied upon as so superseding the former punishment, has been repealed by the 7 & 8 *Geo.* 4, c. 27. It is said that the 2d section of the repealing act saves such acts as relate to the public stores, but I think there are a great many acts which will satisfy that section without reference to the 3 *Geo.* 4. It is clear that the sentence is erroneous.

Poulden then applied for the prisoner's discharge, as this Court could neither itself pronounce the proper sentence,

nor remit the record to the inferior Court, in order that the proper sentence might be pronounced there: *Bourne v. Reg. (a)*, *Rex v. Ellis (b)*.

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Shepherd contra. This Court has merely to annul so much of the sentence as imposes hard labour, which is quite collateral to the rest of the sentence.

Lord DENMAN C. J.—The cases cited are not distinguishable. The prisoner must be discharged.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D. Judgment reversed and prisoner discharged.

(a) 2 N. & P. 248. (b) 5 B. & C. 395; S. C. 8 D. & R. 173.

TIMMS v. WILLIAMS.

Tuesday,
June 7th.

ASSUMPSIT. The declaration was as follows:—*John Timms*, the plaintiff in this suit, *the treasurer for the time being* of a loan society called the City of London Loan Society, established in pursuance of the statute made and passed in the reign of his Majesty King *William* the Fourth, being “An Act for the Establishment of Loan Societies in England and Wales, and to extend the Provisions of the Friendly Societies’ Acts to the Islands of Guernsey, Jersey, and Man,” by, &c., complains of *Charles Williams*, the defendant, &c., for that whereas before the making and passing of the statute, made and passed in the reign of her present Majesty, being an act to amend the laws relating to loan societies, to wit, on the 16th April, 1840, the defendant, and *Joseph Woodward* and *George Spencer*, for securing the payment of the sum of 10*l.*, then and before the passing of the last mentioned statute lent by the said society to the said *J. Woodward*, made their promissory note in writing,

Under 5 & 6 Will. 4, c. 23, s. 8, no action is maintainable by the treasurer for the time being of a friendly society, upon a note given him to secure a loan from the society, but his sole remedy is by proceeding before a magistrate, as therein directed.

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and delivered the same to the treasurer of the said society, at the office of the said society, No. 18, Primrose Street, Bishopsgate Street, and thereby jointly and severally promised to pay to the *treasurer for the time being* of the said society, at the aforesaid office of the said society, the sum of 10*l.* for value received, by weekly instalments of 4*s.* each, the first instalment to become due and payable on Thursday, the 23d April, 1840, between the hours of seven and ten in the evening, and to be continued every Thursday evening then after until the whole should be repaid; and thereupon afterwards, to wit, on the day and year first aforesaid, the defendant, in consideration of the premises, promised *the plaintiff, then being such treasurer* as aforesaid, to pay the said note according to the tenor and effect thereof, and the plaintiff avers that the times for payment of the said instalments had respectively elapsed before the commencement of this suit, and that at the respective times when the said instalments respectively became due and payable, to wit, on Thursday, the said 23d day of April, 1840, between the hours of seven and ten in the evening, and every succeeding Thursday evening, between the hours aforesaid, he the plaintiff, being at all these periods the treasurer of the said society, was ready and willing, at the said office of the said society, to receive payment of the said several instalments, and then, to wit, on each of those days and times presented the said note at the said office, and then and there required payment of the money then due and payable on the said note; nevertheless, the plaintiff says, that although the defendant and the said *J. Woodward* and *G. Spencer* have paid and satisfied the sum of 7*l.* 12*s.*, part of the said sum of 10*l.*, according to the tenor and effect of the said promissory note, yet the defendant hath disregarded his said promise, and hath not, nor have the said *J. Woodward* and *G. Spencer*, or either of them, paid the residue of the said sum of 10*l.*, or any part thereof, and the residue of the said sum of 10*l.*, to wit, the sum of 2*l.* 8*s.*, still remains wholly due and unpaid, to the damage of the plaintiff

as such treasurer as aforesaid of 10*l.*, and therefore he brings his suit, &c.

General demurrer and joinder.

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*W. H. Watson* in support of the demurrer. 1. Even if any action is maintainable in the superior Courts, the plaintiff is not the party to bring it. The note in question is not a promissory note; it is not payable to any particular person or order. The right of action cannot be ambulatory from one treasurer to another. At common law, the treasurer, to whom the note was made payable, would be the only party to sue, and the 5 & 6 *Will.* 4, c. 23, contains nothing to warrant the supposition that a shifting right of action is given to the treasurer and his successors (*a*). It

(*a*) By section 4 it is enacted, "that all monies, goods, chattels and effects whatsoever, shall be vested in the trustee or trustees of such institutions for the time being, for the use and benefit of such institution, and the respective members thereof, their respective executors and administrators, according to their respective claims and interest, and after the death, resignation or removal of any trustee or trustees, shall vest in the succeeding trustee or trustees, for the same estate and interest as the former trustee or trustees had therein, and subject to the same trusts, without any assignment or conveyance whatever, and also shall for all purposes of action or suit, as well criminal as civil, in law or in equity, in anywise touching or concerning the same, be deemed and taken to be, and shall in every such proceeding (where necessary) be stated to be the property of the person or persons appointed to the office of trustee or trustees of such institution for the time being, in his or their proper names, without further description; and such person or persons shall, and they are hereby respectively authorised to bring or defend, or cause to be brought or defended, any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right or claim aforesaid of such institution, and to sue and be sued, plead and be impleaded, in his or their proper name or names, as trustee or trustees of such institution, without any other description; and no suit, action or prosecution shall be discontinued or abate by the death of such person or persons, or his or their removal from the office of trustee or trustees as aforesaid, but the same shall and may be proceeded in by the succeeding trustee or trustees, in the proper name or names of such person or persons commencing the same, any law, usage

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does not appear from this declaration that the treasurer who sues is the same treasurer to whom the note was given. The declaration in its commencement describes the plaintiff as "the treasurer for the time being," which words indicate the person who was treasurer at the time of bringing the action. The declaration afterwards describes the note as an instrument whereby the defendant "promised to pay to the

or custom to the contrary notwithstanding; and such succeeding trustee or trustees shall pay or receive like costs as if the action or suit had been commenced in his or their name or names, for the benefit of or to be reimbursed from the funds of such institution."

By section 8 it is enacted, "that all notes and securities entered into for the payment of such loans shall be made payable to the treasurer or clerk for the time being of the said institution, and if the party or parties liable to pay the same shall fail to make full payment in money of the sum in the note or security mentioned, or any part thereof, for seven days after demand made on such party, or left at his usual place of abode, by or on behalf of the treasurer or clerk for the time being of the said institution, it shall and may be lawful for any one of his Majesty's justices of the peace for the county, riding, city, division or place, where the person or persons respectively so refusing to pay any of such notes or securities as aforesaid, shall or may happen to be or reside, and such justice or justices is and are hereby required, upon complaint made by such treasurer or clerk as aforesaid, to summon the person or persons against

whom such complaint shall be made; and after his, her or their appearance, or in default thereof, upon due proof upon oath of such summons or warning having been given or left as aforesaid, such justice or justices shall proceed to hear and determine the said complaint, and award such sum to be paid by the person or persons respectively liable to the payment of any such note or security, to such treasurer or clerk as aforesaid, as shall appear to such justice or justices to be due thereon, together with such a sum for costs, not exceeding the sum of 10s., as to such justice or justices shall seem meet; and if any person or persons shall refuse or neglect to pay or satisfy such sum of money as upon such complaint as aforesaid shall be adjudged, upon the same being demanded, such justice or justices shall by warrant under his or their hand and seal or hands and seals, cause the same to be levied by distress and sale of the goods of the party so neglecting or refusing as aforesaid, together with all costs and charges attending such distress and sale, and returning the overplus, if any, to the owner, and no such proceedings shall be removed by certiorari, or otherwise, into any of his Majesty's superior Courts of Record."

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treasurer for the time being," which words indicate the person who was treasurer at the time of making the note. [Patteson J. The declaration goes on to say, "and thereupon afterwards, to wit, on the day and year first aforesaid, the defendant in consideration of the premises promised the plaintiff, then being such treasurer as aforesaid, to pay the said note according to the tenor and effect thereof."

Coleridge J. There is nothing in the declaration to shew it is not the same person who was treasurer at both times.]

The declaration should have averred the identity distinctly, to shew the right of action. It is clear that, if there is any right of suing on this note in a superior Court, that right is by the 4th section vested in the trustees of the society. All the property of the society is thereby expressly vested in them, and they are trustees "for the time being," authorized to bring or defend, &c. any action, suit or prosecution, criminal as well as civil, in law or equity, touching or concerning the property, right or claim aforesaid of such institution, and no such proceeding is to abate by the death or removal of any trustee. If this provision had not been introduced, the right of suing must have been confined to the treasurer, to whom the note was given. The provision is similar to section 8 of 54 Geo. 3, c. 170, by which it requires the overseers who sue on a bastardy bond to be the overseers in office at the time of commencing the action: *Addey v. Woolley* (a).

2. No action whatever can be maintained upon this note in the superior Courts. By the 6th section of the act, 15*l.* is the highest amount which the society is enabled to lend to any one individual. It would be most inconvenient and vexatious if, in order to recover small sums, it were necessary to have recourse to the superior Courts. Accordingly the 8th section of the act gives a summary power of recovering loans before magistrates. The intention of the legislature was, that the society should be confined to this

(a) 8 Taunt. 691.

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compendious remedy. *Crisp v. Bunbury* (a) and *Rex v. Trustees of Mildenhall Savings Bank* (b), are applicable on this point.

The statute 3 & 4 *Vict.* c. 110, which is the statute in force with respect to all sums lent by loan societies subsequently to its passing, is in favour of the defendant. By section 16, which corresponds to section 8 of the present act, the treasurer for the time being is to proceed before a magistrate for the recovery of loans. Section 17 enables the treasurer, notwithstanding this provision, to proceed in any county court or court of conscience or request. This shews clearly that, if section 16 had stood alone, it would have prevented any proceeding other than before a magistrate. Section 19 also has a strong bearing upon the first point of the defendant's argument, for it enables the treasurer for the time being to recover the amount of any note made payable to the treasurer for the time being, "whether or not any change or changes shall have taken place in the person by whom the said office, &c. may be filled." The present act contains no such provisions.

*Cowling* contrà. 1. If any action lies, the plaintiff is the proper party to sue. The form of the note, which in pursuance of section 8 of 5 & 6 *Will.* 4, c. 23, is made payable to the treasurer for the time being, enables the treasurer for the time being to sue upon it. The party to whom a note is payable is the proper party to sue upon it. Section 4 of 5 & 6 *Will.* 4 vests the property of the society in the trustees, to enable the society to vindicate its rights against *strangers*, without the necessity of joining all its members as plaintiffs, and the words descriptive of the property vested in them were not intended to include such notes as the present. The words are "monies, goods, chattels and effects," in section 4; and in the corresponding section, in the statute of *Victoria*, the words are "monies,

(a) 8 Bing. 394; S. C. 1 M. & Scott, 646.

(b) 6 A. & E. 952; S. C. 2 N. & P. 278.

and securities for money, and all chattels." The dealings between the society and its own members are regulated by section 8 of 5 & 6 *Will.* 4, and by that section the treasurer for the time being, that is, the treasurer at the time of commencing suit, is the party to sue. *Addey v. Woolley*(a) is in the plaintiff's favour, for it is a similar instance of an officer for the time being, though not the same officer to whom a security is given, having nevertheless a right of action upon that security. Section 19 in the statute of *Victoria* appears to have been enacted merely by way of caution, to make it clear beyond all doubt that there should be a shifting right of action from treasurer to treasurer.

2. It has been argued for the defendant that the remedy upon these notes is confined to the summary proceeding before a magistrate, under 5 & 6 *Will.* 4, c. 23, s. 8. But the language of that section is permissive only. The section says merely "it shall and *may* be lawful" for the magistrate to summon the party. The language in the 9 *Geo.* 4, c. 92, s. 45, which was the enactment construed in *Crisp v. Bunbury*, was peremptory—"The matter so in dispute *shall* be referred to the arbitration of two indifferent persons." A statutory provision, directing a proceeding before magistrates, has often been held cumulative to any remedy previously in force: *Horsefall v. Davy*(b), *Manser v. Taylor*(c). Suppose the magistrates to refuse to proceed, it is doubtful whether this Court would compel them by mandamus, in which case, if there be no right of action, the society would be without remedy. It is a general rule, that the jurisdiction of the superior Courts cannot be ousted, except by express words.

*W. H. Watson* in reply. As to the contingency of magistrates refusing to act, the same argument might have been used in *Cates v. Knight*(d). That case also affords

(a) 8 Taunt. 691.

(b) 1 Holt, N. P. R. 147.

(c) 2 Eagle on Tithes, 393.

(d) 3 T. R. 443.

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an instance where the jurisdiction of the superior Courts was held to have been ousted by implication.

LORD DENMAN C. J.—I think the plaintiff cannot maintain this action. Mr. *Cowling* says the plaintiff can maintain this action, because he is treasurer for the time being of the society, and the note on which he sues is in terms made payable to the treasurer for the time being. But there is no authority for saying that the terms in which a security is drawn can give such a power in themselves, independently of express statutory enactment. I have no doubt that this note was part of the “goods, chattels and effects” of the society, within the 4th section of 5 & 6 *Will.* 4, c. 23, and that it is by the same section vested in the trustees of the society. It is true that the 8th section enables the treasurer for the time being to recover payment of it, but that is only by summary proceeding before a magistrate. The magistrate has full power to do all that is necessary for enforcing payment. The act therefore has provided a complete remedy. We are not to suppose that the magistrate will refuse to act. This statute certainly falls short of enabling the treasurer for the time being to maintain an action on this note, and an express enactment is necessary to enable him to do so. I have no doubt the intention of this statute was the same as in the other acts which have been referred to in argument, and have been construed by this Court, namely, to afford a cheap and ready domestic forum for settling claims against persons in humble life.

PATTESON J.—The question turns principally on the 8th section of 5 & 6 *Will.* 4, c. 23. The words “treasurer for the time being,” as used in that section, are ambiguous. They may mean the treasurer at the time the note is made and his successors, or they may mean the treasurer at the time the note is made and him only. At first I was in favour of the latter construction, and, if that were the true construction, it would be necessary to inquire whether it


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sufficiently appears from the declaration, that the treasurer who now sues is the same person who was treasurer when the note was made. But I now think the statute means the treasurer at the time the note was made, and his successors. Mr. *Cowling* also appears to put this construction on these words in the section, but he goes on to contend that the mere form of making the note payable to "the treasurer for the time being," will enable the person who is treasurer at the time of action brought to sue upon it. If that be so, then all the numerous statutory provisions to be met with, enabling companies to sue by their clerk or other officer, and providing that their actions or suits shall not abate by the death or removal of such officer, must have been altogether unnecessary. This statute contains no such express provision, enabling the treasurer for the time being to sue; but it does contain an express provision enabling such treasurer to enforce payment of these notes by proceeding before a magistrate. I think the remedy upon these notes is confined to the summary proceeding before a magistrate; not that the jurisdiction of the superior Court is taken away without express words, but that the statute creates an instrument of such a nature, that express words were necessary to enable the treasurer to sue upon it, and such words are not to be found. Even with regard to the trustees, there is no power given them to sue upon these securities.

WILLIAMS J.—I am of the same opinion. I do not think Mr. *Cowling* was quite successful in his attempt to distinguish *Crisp v. Bunbury* (a), for though the statute, which the Court had to construe in that case, was more peremptory in some of its terms than the statute now before us, yet the general reasoning of the Chief Justice shews that the object of the legislature in similar enactments is to prevent expense by providing a prompt remedy. It may be re-

(a) 8 Bing. 394; S. C. 1 M. & Scott, 646.



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marked that the 8th section of this statute seems to rise in urgency as it proceeds, for first of all it is said, "it shall and may be lawful" for the justice, then it adds, "and such justice is hereby required," to summon the person against whom the complaint is made, then, "such justice shall proceed to hear," &c., and in case of non-payment, the justice "shall by warrant, &c. cause to be levied" the amount of the debt, so that at last the section seems quite imperative.

COLERIDGE J.—It is enough to say that the present plaintiff cannot maintain this action. There are no words in this, as in other acts, enabling the officer for the time being to sue. It is said that such words were unnecessary, because the merely making the note payable to the treasurer for the time being will enable him to sue. This does not appear to have been the case with bastardy bonds given to the overseers of a parish, and which by 54 Geo. 3, c. 170, s. 8, were vested in the overseers for the time being, for that statute goes on to enable the overseers to sue upon such bonds, and to provide that an action brought by them shall not abate by reason of any change of overseers. It has been asked, what is to be done if the magistrate will not interfere? But the case is not likely to arise, nor was it necessary to provide against it.

D.

Judgment for defendant.

Thursday,  
 June 2d.

BIRNIE v. JANSON.

Where the defendant in an action on a marine policy applied for an order for the examination

of witnesses in New Zealand, and it was not imputed that he made the application for the sake of delay, the Court refused to impose a condition that he should pay the money into Court, and also undertake to pay interest from the time of action brought, in the event of the plaintiff obtaining judgment.

**ROBINSON** moved for a rule to shew cause why an order of Lord Denman C. J., "that the defendant shall be at liberty to examine witnesses upon interrogatories in the Bay of Islands in New Zealand," should not be varied, by

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making it a condition of the order, that the defendant should, on or before the first day of next term, pay into Court, to abide the event of the cause, the sum of 92*l.* 5*s.* 11*d.*, being the rateable amount of the defendant's subscription to the policy in plaintiff's declaration mentioned, and why he should not undertake that, in the event of a judgment being given for the plaintiff, interest should be computed and allowed to the plaintiff on the above amount, from the time of the commencement of the action, and why a time should not be fixed for the return of the commission.

This was an action against an underwriter on a ship policy. Several other actions had been brought against other underwriters on the same policy, and had been consolidated with the present. The cause was made a remanet at the London sittings after Trinity term, 1841. The order, which it was now sought to vary, for the examination of witnesses, was applied for in the following September. The ship had sailed from London to the South Seas; she had encountered bad weather near the Bay of Islands, in February, 1840, and had there been surveyed and condemned. The affidavit in support of the present application expressly stated, that it was not intended to impute to the defendant that the commission to examine witnesses had been obtained for the purposes of delay.

*Robinson*, in support of the application, cited *Baddeley v. Gilmore* (a), *Dalton v. Lloyd* (b), *Bridges v. Fisher* (c), *Marryatt v. Nobre* (d), *Cock v. Donovan* (e), and *Ebden v. Prince* (f). [*Patteson J.* mentioned *Ingram v. Bligh* (g).]

*Buckle* contra, shewed cause in the first instance, and contended that the granting of such a commission had never been made subject to terms, unless under special circum-

(a) 1 M. &amp; W. 55.

(b) 1 Gale, 102.

(c) 1 Bing. N. C. 510.

(d) 1 M'Cle. &amp; Y. 101.

(e) 3 Ves. &amp; B. 76.

(f) 8 Price, 290.

(g) Cited in 1 Archbold's Pr. by Chitty, 244 (7th ed.).

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stances, as in *Dalton v. Lloyd (a)*, where the commission appeared to be sought for the sake of delay.

Lord DENMAN C. J.—I do not think it would be right to establish the precedent of imposing the terms required in the present case. The party, who declares on a contract, which necessarily involves an inquiry in distant countries, must take his chance.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D.

Rule discharged.

(a) 1 Gale, 102.

Friday,  
June 3rd.

PRICE and another v. QUARRELL and another.

The parish of St. Andrew, Pershore, contains six districts, five of them being distinct cha-

peltries, and each maintaining its own poor, independently of each other and of the rest of the parish. The remaining district is divided into St. Andrew's, Pershore, and the hamlet of Pensham. The parish of St. Andrew, apart from Pensham and the five chapelries, contains about 900 acres and about 1000 persons. Pensham contains about 700 acres and 150 persons. Pensham is separated from St. Andrew's by the river Avon, and is about a mile and a half from the church of St. Andrew. There is no church or chapel in Pensham, but its inhabitants have pews in the church of St. Andrew, and have immemorially contributed to the repairs of that church in the proportion of one-third.

For forty years there had been one workhouse, situate in St. Andrew's, for the use of the poor of St. Andrew's and Pensham jointly; and the poor of the two divisions had been jointly and indiscriminately relieved as far back as could be traced previously to that period. The fund for their relief was raised by a contribution of two-thirds from St. Andrew's and one-third from Pensham. Orders of removal had been made to and from Pensham as between Pensham and other places, but not as between Pensham and St. Andrew's. Pensham was separately assessed to the land tax. It had also its own collector of poor and county rates, its own constable and surveyor of the highway. St. Andrew's had two overseers and Pensham one.

*Held*, on a special case stating the above facts, and referring the question to the Court, with liberty to draw such inferences from them as a jury might, that Pensham was not a separate township from St. Andrew's, in respect of the maintenance of its poor, within the 13 & 14 Car. 2, and that it had and was in a condition to have the benefit of the 43 *Elis.* c. 2.

An application having been made to the Court of Queen's Bench in Trinity term, 1839, on behalf of the inhabitants of the said parish of St. Andrew, to quash a certain order, dated the 6th April, 1837, of two of her Majesty's justices of the peace for the county of Worcester, whereby they appointed certain persons therein mentioned overseers of the poor for the said township, described in the said order as "the hamlet of Pensham," for the insufficiency thereof, the Court directed a feigned issue or issues, which, under a judge's order, were afterwards framed as follows :—

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1. Whether St. Andrew in Pershore and the township of Pensham have from the time of the statute of the 43 *Eliz.* c. 2, maintained their own poor jointly and independently of the townships of Besford, Defford, Bricklehampton, Wick and Pinvin.

2. Whether the township of Pensham is a separate and distinct township in respect of the maintenance of its poor, within the meaning of the statute 13 & 14 *Car.* 2, c. 12, or not.

3. Whether the five chapelries of Besford, Defford, Bricklehampton, Wick and Pinvin, or any and which of them were at the time of the passing of the said statute of *Elizabeth* reputed parishes or not.

4. Whether the said five chapelries, or any and which of them, have maintained their own poor, each separately, from the time of the passing of the said statute of *Elizabeth*.

5. Whether the said five chapelries, or any and which of them, at the time of the passing of the said statute of *Elizabeth* were ecclesiastically separated from and wholly independent of the Mother Church.

6. Whether the township of Pensham can have the benefit of the statute 43 *Eliz.* c. 2.

The issues came on for trial before *Alderson* B. at the Gloucester summer assizes, 1839, when a verdict was taken by consent for the plaintiffs upon all such issues, subject to

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the opinion of this Court upon the following facts, with liberty for the Court to draw such conclusions as a jury might have done, and to inspect any of the original documents hereinafter mentioned, or copies thereof, if the Court should think proper.

The case was stated at great length and set out a great mass of documentary evidence. The following seemed to be the most important facts of the case:—

“ In Pershore, in Worcestershire, there is a parish called the parish of St. Andrew. In an instrument dated the 5th July, 1331, by which its church was endowed as a perpetual vicarage, it is designated by the title of the ‘ Parish Church of Pershore.’

“ There is another parish in Pershore called ‘ Holy Cross.’ Its church is the remnant of an ancient monastery, which in the instrument of endowment above mentioned is noticed by the name of ‘ The Monastery of Pershore.’

“ The church-yard used by the parish of St. Andrew for the burial of its dead, though contiguous to the church of St. Andrew, is situate in the parish of Holy Cross (from whose church it is separated by the highway), and is the property of a layman, who receives certain stipulated sums for breaking the soil. The parish of St. Andrew is not known to have ever had or used any other churchyard or burial ground.

“ By letters patent in the second year of the reign of Queen *Elizabeth*, her Majesty granted to the dean and chapter of the collegiate church of Westminster the manors of Pershore, Pensham, Pinvin, Wick, Benholme and Bricklehampton, likewise portions of tithe in Wick, Pensham and Pinvin, and the advowson, presentation and right of patronage of the vicarage of the parish church of St. Andrew in Pershore, also the leets and view of frankpledge of Benholme, with the liberties, courts and enrolments in the hamlets (amongst others) of Pinvin, Bricklehampton, Pensham and Wick.

“ Leases of these premises, or parts of them, have been

granted from time to time by the dean and chapter, and their lessees have presented to the vicarage of St. Andrew.

"The parish of St. Andrew, apart from the township of Pensham and the five chapelries mentioned in the issues, contains about 900 acres of land, and a population of about 1000 persons. The township of Pensham contains about 704 acres of land, and a population of about 150 persons. This township is separated from the parish of St. Andrew by the river Avon, and its hamlet is about a mile and a half distant from the church of St. Andrew. The chapelries are at the following respective distances from that church, viz. Besford about  $3\frac{1}{2}$  miles, Defford  $3\frac{1}{4}$ , Bricklehampton  $3\frac{1}{4}$ , Penvin 2, Wick 1.

"There is no church or chapel in the township of Pensham, but its inhabitants have pews in the church of St. Andrew, and have immemorially contributed to the repairs of that church in the proportion of one-third. In the annual transcripts of registers of baptisms, marriages and burials, returned by the parish of St. Andrew to the bishop of the diocese (and which are extant in the bishop's registry from the year 1612), the township of Pensham has always been included.

"For 40 years prior to the formation of the Pershore union, under the Poor Law Amendment Act in 1835, there was one workhouse situate in St. Andrew's for the use of the poor of St. Andrew's and Pensham jointly. The poor had been jointly and indiscriminately relieved as far back as can be traced previously to that period. The fund for their relief was raised by a contribution of two-thirds of the gross sum requisite from St. Andrew's, and one-third from Pensham. The share so payable by Pensham was familiarly known by the name of "The Pensham Thirds."

"The existence of this system and ratio of apportionment is evidenced by the overseers' account books of the parish of St. Andrew as far back as the year 1743, beyond which those books do not extend, and by those of Pensham commencing in 1814. There is also a document found among

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the rolls of the quarter sessions of the county for the year 1698, purporting to be an agreement 'at a parish meeting Nov. 24, 97,' by certain persons, inhabitants of St. Andrew Pershore, whose names were thereunto subscribed, that for the payment of the rent due for the houses of poor people that were purchased in by the overseers of the parish and were yet owing, a levy should be made upon all the inhabitants of the lands and tenements within the said parish, that every one's estate within the parish might pay their proportion. The document then proceeds as follows:—  
 "Memorandum. Pensham to pay their proportion of this charge for rents as they usually do, the third part of all charges to the poor.' There are nineteen names subscribed, one with the addition '*vicar*,' and two others with the addition '*overseers*.' Annexed to this document is another purporting to be an order of sessions (Easter, 1698,) that the inhabitants of St. Andrew Pershore and Pensham should make a levy to pay the rent of the houses according to the officers' agreement.

"It appears from the above-mentioned accounts of St. Andrew's and Pensham respectively that there were certain specific disbursements which did not enter into the account of charges to be apportioned, but which were respectively borne by St. Andrew's or Pensham, as they happened within the one or the other of those districts respectively. The following is a note of some of these disbursements, viz. quarters' rates, shire hall rates, constables' bill, payments for militia substitutes, payments to the wives and families of militia men, magistrate's clerk for overseers' appointments, ditto on verification of jury and lunatic lists, printing jury lists, making population returns, levy and account books.

"There is a charge in the account of the overseers of St. Andrew's for July 1758, of a sum paid for shoes for a boy stated to be of Pensham.

"The account books of St. Andrew's above mentioned, besides the overseer's accounts, contain also entries of

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vestry meetings to audit and settle those accounts, to grant rates for the relief of the poor, and to appoint churchwardens and nominate overseers; such meetings being attended and entries signed by the inhabitants of Pensham in common with those of St. Andrew's. In ordering rates for the relief of the poor, the course has been to ascertain the sum necessary to meet the expenditure of the whole parish, (that is, St. Andrew's and Pensham,) according to which the rate was fixed. The Pensham share of the aggregate amount has been raised by Pensham without any interference in the collection of it on the part of St. Andrew's.

"The Pensham overseers' books also contain entries of meetings (which in three instances are styled 'Parish Meetings') to audit and settle the accounts, to nominate overseers, to grant rates for the relief of the poor, and to direct specific relief to them in money or in kind. These accounts purport to be annually verified on oath and allowed by two justices of the peace.

"There is also a book in the possession of the overseers of Pensham, purporting to contain accounts of levies and assessments made for the poor of Pensham from the year 1810 to 1819, and another book purporting to contain similar accounts for the years 1834 to 1837, of which assessments five only have magistrates' signatures affixed to them, viz. those for the years 1834 and 1835, the signatures of two magistrates each, and those for the years 1817, 1836 and 1837, the signature of one magistrate only.

"The earliest notice of the existence of an overseer for the township of Pensham is furnished by an entry in the overseer's book of St. Andrew's, under the date of the 3rd of April, 1746, which mentions the receipt from *William Wood*, 'Pensham overseer,' of a balance due upon the accounts of Pensham's share of bye charges. Three later entries in the same book, viz. 1796, 1800 and 1802, respectively mention 'Pensham overseers' in the plural number. Lists of appointments of overseers from the year 1816, which are in the custody of the clerk of the magistrates for



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the Pershore division, shew the annual appointment from that year to 1830 of one overseer for Pensham, and from 1830 of two.

“ The overseers of St. Andrew's and Pensham, respectively, are in possession of the following documents relating to the settlement of the poor, viz.

“ The Overseers of St. Andrew's.

“ 1. A certificate dated 23d March, 1744, from the parish of Severn Stoke, directed to the churchwardens and overseers of the poor of St. Andrew's acknowledging that one *John Cooke*, ‘ of Pensham, in the said parish of St. Andrew,’ was an inhabitant legally settled in the said parish of Severn Stoke.

“ 2. Two indentures of apprenticeship of the respective dates of May 23, 1776, and November, 1785, under the seals of four persons described as churchwardens and overseers of the poor of the parish of St. Andrew, one of those persons being in each case an inhabitant of Pensham.

“ 3. Bonds to certain persons described as the churchwardens and overseers of the poor of the parish of St. Andrew for indemnifying the said parish against the charges of certain bastard children, in one of which, dated the 26th July, 1804, two of the obligees were inhabitants of Pensham, and the mother of the child is described as of the parish of St. Andrew. In another of these bonds, dated the 12th January, 1810, one of the obligees was an inhabitant of Pensham, and the mother of the child is described as of the ‘ hamlet of Pensham in the parish of St. Andrew,’ in which hamlet she is alleged to have been lately delivered. Another of these bonds, dated 6th September, 1804, purports to be given by two persons described as of the ‘ hamlet of Pensham, in the parish of St. Andrew in Pershore,’ one of these persons being a churchwarden of St. Andrew, and it purports to indemnify ‘ the said churchwardens and overseers and all the other inhabitants of the said hamlet and parish.’

**" The Overseers of Pensham.**

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" 1. An order of filiation made the 2d September, 1817, upon the complaint of the churchwardens and overseers for the relief of the hamlet of Pensham, in respect of a male bastard child then lately born in the said hamlet of Pensham.

" 2. Three orders of removal of paupers from the hamlet of Pensham made respectively in the years 1817, 1829 and 1831, upon the complaint of the churchwardens and overseers of that hamlet.

" 3. Three orders of removal to the hamlet of Pensham, one of which dated 1st December, 1818, upon the appeal of the churchwardens and overseers of that hamlet, was subsequently quashed by the quarter sessions as to one of the paupers, and confirmed as to the other, and the sum of 40s. for costs ordered to be paid to the churchwardens and overseers of the said hamlet. Another of these last-mentioned orders, dated 12th March, 1823, is from the hamlet of Pinvin; and the third, dated 22d March, 1831, describes Pensham by the terms, ' The hamlet of Pensham in the parish of St. Andrew in Pershore.'

" No removal or order of removal of paupers from St. Andrew's to Pensham, or from Pensham to St. Andrew's, has ever been made."

By an order of the Poor Law Commissioners, made the 28th September, 1831, Pensham was united with several other places for the administration of the laws for the relief of the poor, and by the same order two guardians were assigned to the parish of St. Andrew, and one to Pensham.

From the year 1830 (when the act requiring such return came into operation) Pensham has regularly returned to the clerk of the peace a separate list of its pauper lunatics, and from 1834 a list of its inhabitants liable to serve on juries.

" From the year 1781 to 1832 Pensham was separately assessed to the land tax and had a collector of its own, separate from and unconnected with the collector of the parish of St. Andrew, who annually returned to the com-

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missioners of taxes and assessments a list of all property within the hamlet. In these appointments Pensham is, in five instances, described as a parish, viz. in the years 1825, 1829, 1830, 1831 and 1832.

“ Fifty-one years ago the county rates for St. Andrew's and Pensham respectively began to be separately collected, and have continued to be so to the present time.

“ Pensham has always had a separate constable and surveyor of the highways.

“ Previously to the year 1810 there was a large tract of open land within the limits of Pensham, which was then inclosed under an inclosure act and allotted to the proprietors of land in that hamlet. By a clause in the act notice of the Commissioners' proceedings is directed to be affixed on the door of the church of St. Andrew.”

The case then proceeded to state the evidence as to the subordinate issues (the 3d and 4th and 5th) respecting the five townships. It has not been deemed necessary to set out this evidence at length. The following appear to be the most material statements contained in this part of the case.

“ The five ‘ chapels’ of Besford, &c. are noticed in the instrument of endowment before referred to, as annexed to or dependent upon the church of St. Andrew, and ‘ the obventions’ of those ‘ chapels’ are among the revenues assigned by that instrument for the endowment of the vicarage.”

In a terrier of St. Andrew's of the date of 1585 the tithe lands of the five “ chapels” are mentioned as belonging to the vicar of St. Andrew.

“ In the parliamentary survey of 1649, these chapels are respectively mentioned as having each a separate curate and cure of souls of the annual value respectively, Bricklehampton of 12*l.* the others of 10*l.* each. The curates are respectively appointed by the vicar of St. Andrew.

“ These chapelries have each had, as far back as can be traced, a separate church or chapel with a bell or bells.

They have respectively had separate wardens of such chapel (sometimes called churchwardens, at other times chapelwardens) whose regular attendance to take their oaths of office is noticed in the visitation books, now extant in the registry of the diocese, from their commencement in 1665. They have also had separate overseers of the poor, (sometimes two, at other times one,) and have each separately repaired its own chapel, and maintained its own poor without ever contributing to the repairs of the church or maintenance of the poor of the parish of St. Andrew."

The verdict, taken for the plaintiffs, was to be entered for the plaintiffs or defendants respectively upon each issue, according to the order and direction of the Court upon the argument.

The case was now argued by *Erle* for the plaintiffs, and Sir F. Pollock A. G. for the defendants (a). The authorities cited were *Hilton v. Pawle* (b); *Nicols v. Walker* (c); *Rudd v. Morton* (d); 1 *Burn's Ecc. Law*, 299; *Rex v. Horton* (e); *Rex v. Justices of Salop* (f); *Reg. v. Justices of Worcestershire* (g); *Rex v. Palmer* (h), 3 *Burn's Ecc. Law*, tit. Offerings; *Rex v. Newell* (i); *Bastock v. Ridgway*, (k); and statutes 9 *Geo. 1*, c. 7, s. 4; 12 *Geo. 2*, c. 29, s. 2; 9 *Geo. 4*, c. 40, s. 36.

*Cur. adv. vult.*

Lord DENMAN C. J. on a subsequent day in this term (June 7th) delivered the judgment of the Court as follows :—Whether the interest connected with these proceedings bear any fair proportion to the expense and trouble which have been incurred, it is useless now to inquire. Questions

(a) Before Lord Denman C. J.,  
*Patteson, Williams and Coleridge*,  
Js.

(b) Cro. Car. 92.

(c) Cro. Car. 501.

(d) 2 Salk. 501.

(e) 1 T. R. 374.

(f) 3 B. & Ad. 910.

(g) 3 N. & P. 434, and 3 P. &  
D. 465.

(h) 8 East, 416.

(i) 4 T. R. 266.

(k) 6 B. & C. 496; S. C. 9 D.  
& R. 585.

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have been raised and are submitted to us for decision, and must therefore be disposed of. That can be done only in one of two ways, either the case must be sent back for the decision of a jury, the proper tribunal for such decision; or the Court must undertake a duty, somewhat unusually, and perhaps irregularly cast upon it, of drawing conclusions from facts. We have no doubt but that the former would have been the more regular course. We undertake the latter however, without intending thereby to create a precedent, in order to save the great additional expense which a trial must unavoidably occasion to the parties.

We shall somewhat change the order of the questions, and first notice the second, which seems to have the most important bearing upon the matters in dispute, and virtually to include the first.

This second question is as to the unity of St. Andrew in Pershore and Pensham, or their separation from each other, as respects the maintenance of the poor, within the meaning of stat. 13 & 14 Car. 2, c. 12, s. 21.

We think that the evidence both as to quantity and antiquity (which latter it is unnecessary to remark is very material in such cases) preponderates greatly in favour of their identity. And upon this point, though a very large mass of evidence has been collected, we do not consider it to be needful to enter into a detailed examination of it, inasmuch as there is a perfect agreement on both sides as to one point, which we think is decisive of the question. The case finds that, for forty years before 1835, there was one workhouse situate in St. Andrew's, for the use of the poor of St. Andrew's and Pensham jointly; and that "the poor had been jointly and indiscriminately relieved *as far back as can be traced previously to that period.*" So that, in whatever manner the quota of two thirds for one district and one third for the other may have been raised by each, (a matter which we do not consider to be material), *the whole* when raised constituted *one fund* for the maintenance of the poor. This has always been deemed the leading con-

sideration in questions of this kind. In the case of *Rex v. Newell* (a), in which, from the appointment for a great length of time, if not immemorially, of a lawful number of overseers, (and not as here so frequently of *one*), and from separate transactions, the two districts had so much the appearance of having been distinct, Lord *Kenyon*, in giving judgment, selected from the case the following passage. "The two parts of the parish have paid, the hamlet three eighths, and the borough part five eighths, of the whole expenses incurred by the poor of both parts of the parish; *the whole expenses, when incurred, being computed into one integral sum*," and "the overseers of each part have accounted with each other." He then adds, "then it appears to have been only one district, affording one integral fund for the poor of both parishes;" and his judgment was accordingly in favour of the unity of the two districts. Mr. Justice *Ashhurst* is reported to have stated his opinion thus: "what is *decisive* in this case is, that it does not appear that these districts have ever acted separately, but on the contrary that they have had *one joint sum* for the poor of both parts of the parishes, and that they have settled their accounts at the end of the year." The only other judge (Mr. Justice *Grose*) rested his judgment mainly on the same ground.

The same question again came into consideration in a much more subsequent case of *Bastock v. Ridgway* (b). That was an issue to try whether the hamlet of Singleborough was legally separated and divided from the township of Great Horwood, in the county of Buckingham, for the relief and maintenance of the poor. The following extract from the judgment of Mr. Justice *Bayley*, which is in perfect conformity with the case above quoted, will suffice for our present purpose. "To constitute a valid separation of the hamlet and township, there ought to have been not only a *separate collection* of funds, but a *separate and distinct application* of the funds themselves; for, although

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(a) 4 T. R. 266. (b) 6 B. & C. 496; S. C. 9 D. & R. 585.

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certain proportions of the funds may have been collected *immemorially* in particular districts within the parish, yet if they all afterwards constitute one entire fund, and were applied to maintain the poor of the parish generally, it cannot then be said of that parish that by reason of its largeness, it could not have the benefit of the statute 43 *Eliz.*" The concluding remarks of the learned judge apply to a parish having the benefit of the statute of *Elizabeth*. But the precise question, it will be observed, was whether one district was legally separated and divided from another. We entirely agree and are fully satisfied with the soundness of these principles, and are of opinion that they dispose of the second question, which must therefore be answered in the negative.

It follows that the earlier part of the first question must be answered in the affirmative; for we have already expressed our opinion that St. Andrew's Pershore and Pen-sham are not separated for the maintenance of their poor; and when we find it stated, (without any thing to the contrary), that each of the five townships (or chapelries) has "maintained its own poor, without ever contributing to the repairs of the church or maintenance of the poor of St. Andrew," it follows that our answer must be in the affirmative to the whole question.

We do not perceive that the third question, whether the five enumerated chapelries at the time of the passing the statute of *Elizabeth* were reputed *parishes*, has any material bearing upon the principal point in dispute. That they all existed as *chapelries* at the period in question seems to be placed beyond a doubt. But, when in the earlier and most important documents, (the endowment in 1331, the terrier of 1585, which seems to have been very accurately and minutely drawn up, and the parliamentary survey), they are also clearly denominated chapelries, and in several of their own private documents their officers are called by themselves *chapel* wardens, we see no reason for concluding, and

do not think, that they had at the time in question acquired the title of *parishes* by reputation.

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We have already observed, as to the fourth question, that all the evidence seems to lead to one conclusion, viz., that each of the five chapelries has maintained its own poor separately from the time of passing of the statute of *Elizabeth*.

As to the fifth question, when we find from the parliamentary survey, that the curates (as they are there called) of the chapelries "are respectively appointed by the vicar of St. Andrew," and that in the instrument of endowment, and the terrier before referred to, they are described as "annexed or dependent," and also "belonging to" the said church, we do not think that any of the said five chapelries "were ecclesiastically separated from, and wholly independent of, the mother church."

Our answer to the second (and most important) question applies in a great degree to the last. Generally speaking, when questions have arisen as to whether any district can have the benefit of the statute of *Elizabeth*, a leading principle has been the state of things before. If the district *has had* the benefit, it has always (except there may have been some important change in the state of things) been considered an important reason for its continuing to have it. "These circumstances," in the language of Mr. Justice *Grose* in the case first cited, "convince me that this parish *can* have and *have* had the benefit of the statute of *Elizabeth*." Without therefore entering into the question, (which it is not at all necessary to do), how far a district may be *now* subdivided for the purposes of the poor, our opinion, as before stated, is that Pensham and Pershore have jointly maintained their poor; and that nothing appears in the case to shew that they cannot continue to do so. Our answer therefore to this, the last question, must be in the affirmative.

D.

Verdict to be entered accordingly.



1843.

Friday,  
May 27th.

To a declaration in trover by the assignees of an insolvent, the defendant pleaded that before the insolvent's imprisonment he discounted for insolvent a bill of exchange payable one month after date, and that to secure payment of the bill the insolvent executed a bill of sale of the goods in question to the defendant, by which the insolvent covenanted that in case of his default in paying the bill of exchange the defendant should have the goods as his absolute property. The plea then

stated that the bill of exchange was not paid when it became due, and that thereupon, and before the insolvent's imprisonment, the defendant took possession of the goods and converted them.

The plaintiff replied that the defendant had *sold* the goods *after* the insolvent's imprisonment had commenced, and relied upon 1 & 2 Vict. c. 110, s. 61, which enacts, that no person shall after the commencement of the imprisonment of the insolvent "avail himself" of any bill of sale given by the insolvent, "either by seizure and sale of the property of such prisoner, or by sale of such property theretofore seized," but that any person to whom any sum of money shall be due in "respect of such bill of sale" may be a creditor for the same under the act.

*Held*, that the plea was good, as by the terms of the bill of sale the defendant had become absolute owner of the goods on the insolvent's failure to pay the bill of exchange before the imprisonment; and the sale, after the imprisonment, had been made by virtue of such ownership and not of the bill of sale, and, therefore, the defendant had not "availed himself" of the bill of sale within the meaning of the section.

HUNT and another, Assignees of E. E. WILMOT, an  
Insolvent, v. ROBINS.

**TROVER.** The declaration stated that *Elizabeth Eliza Wilmot*, the insolvent, before she subscribed her petition to the Insolvent Debtors' Court, and before the plaintiffs became assignees, to wit, on the 1st May, 1838, was possessed as of her own property of certain goods, and charged that the defendant, well knowing them to be the property of *Wilmot* before she subscribed her petition, and of right to belong to the plaintiffs as assignees after she subscribed her petition, to wit, on the 6th December, 1838, converted the same, &c.

3d. Plea. That by a certain indenture made heretofore, and whilst *Wilmot* was possessed as aforesaid of the goods in the declaration mentioned, before she subscribed her petition, and before the commencement of her imprisonment, to wit, on the 21st day of February, 1838, between *Wilmot* of the one part, and *George Luckin* of the other part, after reciting that *Wilmot* had requested *Luckin* to discount for her a certain bill of exchange, bearing even date with the said indenture, drawn by *Luckin* upon and accepted by *Wilmot*, for payment of 100*l.* at one month after date, which *Luckin* had agreed to do upon having the payment of the bill secured to him in the manner therein after mentioned, *Wilmot*, in consideration of the sum of

100l. paid by *Luckin* to *Wilmot*, did grant, bargain, sell and confirm unto *Luckin*, his executors, administrators and assigns the goods in the declaration mentioned, To have and to hold the said goods thenceforth unto *Luckin*, his executors, administrators and assigns, subject nevertheless to the proviso thereafter contained. And by the said proviso it was provided, that if *Wilmot*, her executors, administrators or assigns, or any of them, should pay the bill of exchange when the same should become payable, then the indenture should determine and be void to all intents and purposes. And *Wilmot*, by the indenture, for herself, her executors, administrators and assigns, did covenant and grant with and to the said *G. Luckin*, his executors, administrators and assigns, in manner following:—that she, her executors or administrators, would pay the bill of exchange at the time and in manner aforesaid; and that in case default should happen to be made in payment thereof, *Luckin*, his executors, administrators and assigns should and might peaceably and quietly have, receive and enjoy, to his and their own proper and absolute use and behoof for ever, the said thereby bargained and sold goods, without any lawful let, suit, trouble, molestation or denial of *Wilmot*, her executors, administrators or assigns, or any other person or persons whomsoever, as by the indenture. That the bill of exchange in the indenture mentioned became due before *Wilmot* subscribed her petition as aforesaid, and before the commencement of the imprisonment, and before the plaintiffs became assignees as aforesaid, to wit, on the 24th March, 1838, and that *Wilmot* did not pay the bill of exchange when the same became payable, but wholly refused and neglected so to do and therein wholly failed. And thereupon *Luckin* afterwards and before the said *Wilmot* subscribed her said petition and before the commencement of her imprisonment, and before the plaintiffs became assignees as aforesaid, to wit, on the day and year last aforesaid, entered into the possession of and took and had the goods to his own use, under and by virtue

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of the indenture. Whereupon the defendant, as the servant and by the command of *Luckin*, after such default as aforesaid, to wit, at the said time when, &c. converted and disposed of the goods in the declaration mentioned. Verification.

4th Plea. That the said *Wilmot* heretofore, before she subscribed her petition and before the commencement of her imprisonment, and before the time when, &c. to wit, on the 13th November, 1838, for a bona fide good, valuable and sufficient consideration, to wit, the sum of 137*l.*, to wit, on the day and year last aforesaid, paid by the defendant to *Wilmot*, bargained, sold and assigned to defendant the goods in the declaration mentioned, and the same goods were delivered to and possessed by the defendant. Wherefore the defendant afterwards, at the time when, &c. in the declaration mentioned, committed the alleged grievance in the declaration mentioned, &c. Verification.

Replication. That after the making of the indenture as in the 3d plea mentioned, and after the passing of 1 & 2 Vict. c. 110, s. 61, and after the 1st October, 1838, the time appointed for the provisions of the act to come into operation, and before any sale of the goods in the declaration mentioned by *Luckin* under the indenture, to wit, on the 23d November, 1838, the imprisonment of *Wilmot* commenced, and from thence, until and at the time of the making of the vesting order next mentioned, the giving of the notice and the making of the sale of the goods, as hereafter mentioned, continued. The replication then stated that on the 4th December a vesting order was made by the Insolvent Court, vesting *Wilmot's* estate in a provisional assignee; that on the 29th January, 1839, the plaintiffs were appointed assignees of *Wilmot's* estate, and that, before they were appointed assignees, the provisional assignee, on the 6th December, 1838, gave notice to the defendant of *Wilmot's* imprisonment and petition, that defendant, nevertheless, after the commencement of such imprison-

ment, and after *Wilmot* had petitioned for her discharge, and after the vesting order, and after the statute came into operation, and after the giving the said notice to the defendant, to wit, on the 6th December, 1838, *in order to make the said bill of sale available, sold the goods* in the declaration mentioned, contrary to the form of the statute, which sale is the conversion in the declaration mentioned.

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The replication to the 4th plea was substantially the same with the first replication.

Special demurrer to the first replication, on the grounds that it is not shewn by the replication that the possession and property by the plea shewn to have been vested in *Luckin* at the time of the commencement of the imprisonment of *Wilmot* was ever divested; that under the circumstances disclosed in the count, plea and replication the conversion complained of was rightful; that while the plea shews and the replication does not deny that the possession and right of possession of *Wilmot*, whereon the plaintiffs' claim is in the count founded, had before the commencement of the imprisonment passed to *Luckin*, the replication does not shew that the plaintiffs subsequently acquired possession or the right of possession; that the replication in claiming for the plaintiffs as assignees a right of possession which, as against *Wilmot* had passed to *Luckin*, departs from the count, which does not state any possession by the plaintiffs as assignees, but founds their right of action on their right of possession only, and such her right of possession is by the plea shewn to have passed to another before her imprisonment began.

Special demurrer to the replication to the 4th plea, on the ground that the plea asserts and the replication does not deny that before the commencement of the imprisonment of *Wilmot* she sold and delivered the goods in question to the defendant for a valuable consideration, and that the defendant thereon was possessed of the goods as a bona fide purchaser for value; that the sale and delivery of goods is not the less effectual to maintain the rights of the

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purchaser as owner by reason that such sale was effectuated or accompanied by an indenture commonly called a bill of sale between the vendor and purchaser. The other grounds of demurrer were the same as to the replication to the 3d plea.

*J. Henderson* in support of the demurrer. The question turns on the 1 & 2 Vict. c. 110, s. 61, which enacts, that "in all cases where any prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, or *bill of sale*, whether for a valuable consideration or otherwise, *no person shall*, after the commencement of the imprisonment of such prisoner, *avail himself* or herself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, or of such bill of sale, *either by seizure and sale* of the property of such prisoner or any part thereof, *or by sale of such property theretofore seized*, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or cognovit actionem, or of such bill of sale, shall and may be a creditor and creditors for the same under this act." It is clear that this section applies to such bills of sale only as are a *security* for a debt subsisting at the time of the insolvency. But the bill of sale in question had ceased to be a *security* at the time of *Wilmot's* imprisonment, and therefore is not within the section. It appears from the third plea that *Luckin*, in the month of February had discounted for *Wilmot* a bill of exchange payable one month after date. As a security for payment of this bill *Wilmot* assigned the goods in question to *Luckin* by indenture of bargain and sale, which contained a covenant on the part of *Wilmot* vesting the goods absolutely in *Luckin*, in case *Wilmot* should make default in paying the bill of exchange. In the month of

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March, therefore, when the bill of exchange became due and *Wilmot* failed to pay it, the goods in question, under the above-mentioned covenant, became the absolute property of *Luckin*, and *Luckin* accordingly then took possession of them. The sale, therefore, by *Luckin* after the commencement of the imprisonment was a sale of his own goods. *Luckin* had already "availed himself" of the bill of sale, for the goods had become absolutely his own under the bill of sale *before* the imprisonment, and he had no occasion to "avail himself" of the bill of sale in order to sell the goods after the imprisonment. The concluding part of the section makes it clear that it was not intended to make it applicable to a party who had already realised the fruits of his security, for it provides that any person to whom any sum shall be "due" in respect of a bill of sale may be "a creditor for the same under the act." *Luckin* had been paid by the goods and had ceased to be a creditor before the imprisonment. The construction put upon 6 *Geo. 4*, c. 16, s. 108, which contains a similar provision with respect to any "creditor having security for his debt," in *Wymer v. Kemble* (a) and *Morland v. Pellatt* (b) is in point for the defendant. [*Coleridge J.* The section in the Insolvent Act says "theretofore seized."] That must mean seized under the bill of sale. In this case there was possession such as any ordinary purchaser of goods might have. It could not have been intended to put a purchaser under a bill of sale, after a sale completed by delivery, in a worse situation than any ordinary purchaser without bill of sale.

He then contended that the replication was a departure, on the grounds pointed out in the special demurrer.

*Petersdorff* contra. The section is clearly expressed, and the effect of it is, that so long as the insolvent's goods

(a) 6 B. & C. 479; S. C. 9 D. (b) 8 B. & C. 722; S. C. 2 M. & R. 511. & R. 411.

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remain in specie, at the time of his imprisonment, no warrant of attorney, cognovit or bill of sale shall be available afterwards for the purpose of selling the goods. [Lord Denman C. J. *Luckin* sold the goods because they were his; he did not avail himself of the bill of exchange in selling them. *Patteson* J. Suppose it not to be a creditor at all who takes possession under a bill of sale, but an ordinary purchaser, would it be within the statute to sell, after the commencement of the imprisonment?] The legislature may have thought that there would be a possibility of fraud so long as the goods were unsold, and therefore has made the sale the dividing point.

*J. Henderson* was not heard in reply.

LORD DENMAN C. J.—The words of the section may appear at first sight to apply, but, when properly considered, they clearly do not apply. The object of the section was to prevent a person, to whom a warrant of attorney or cognovit or bill of sale had been given, from availing himself of it after the commencement of the insolvent's imprisonment; but the provision that no person shall, after the commencement of the insolvent's imprisonment, avail himself of a bill of sale "by sale of such property theretofore seized" cannot apply to a person who has become absolute owner of the property before the imprisonment. *Luckin* had, as stated in the plea, taken possession of the property long before the imprisonment, and he had possession of it as of any other part of his property.

PATTESON J.—Whatever may be the right construction of the act with respect to bills of sale in general, the present bill of sale is certainly not within it. This bill of sale does not contain any power of sale with respect to the goods in question, and direct that after applying the proceeds to payment of *Luckin's* debt, the residue, if any,

shall be paid over to *Wilmot*. If the deed had contained such a power it might perhaps be said, that the sale was under the bill of sale. But, as the case stands, the sale of the goods was made, not because *Luckin* had a bill of sale, but because he was absolute owner of them. It cannot, therefore, be said that in selling these goods *Luckin* availed himself of the bill of sale.

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WILLIAMS J.—On *Wilmot* failing to pay the bill of exchange, the bill of sale empowered *Luckin* to take the goods in his possession. Accordingly on *Wilmot's* default *Luckin* did take possession of them, and he had the possession and unqualified ownership of them as of any other part of his property before the imprisonment commenced. On his so taking possession, the bill of sale and the goods ceased at once to be a security, for his debt was satisfied and the transaction closed.

COLERIDGE J.—There are two states of things and two dates to be considered: the first is the state of things before the bill of exchange became due, and the second is the state of things subsequently. The argument on behalf of the assignees would apply to the first state of things, for so long as it continued *Luckin* was merely mortgagee, as it were. But, after default had been made by *Wilmot* in paying the bill of exchange, *Luckin* became immediately clothed with the absolute ownership of the goods, and all that was done afterwards was authorised, not by virtue of the bill of sale, but by virtue of his ownership.

D.

Judgment for the defendant.





1843.

*Saturday,*  
*May 8th.*

Copyhold tenants, having a commonable right over the waste of a manor, are not competent witnesses for the lord of a manor, lessor of the plaintiff, in an ejectment, in which the contention is whether the land in dispute is parcel of the waste of the manor.

DOE *d.* PYE *v.* BRANWHITE.

**EJECTMENT** for lands in Suffolk. At the trial before *Bosanquet J.*, at the Suffolk spring assizes, 1841, it appeared that the land in question was a piece of land called Sayer's Green, alleged to be part of the manor of Lavenham. The lord of the manor of Lavenham was the lessor of the plaintiff, and the land was sought to be recovered as part of the waste of the manor. Certain tenants of the manor having commonable rights over all the waste of the manor, were tendered as witnesses for the plaintiff, and objected to by the defendant, but admitted to give evidence by the learned judge, their names having been indorsed upon the record, under the stat. 3 & 4 *Will.* 4, c. 42, s. 26. The plaintiff had a verdict. A rule was granted to shew cause why there should not be a new trial, on the ground that the evidence was improperly received.

*Kelly* and *Byles* shewed cause. The tenants of the manor were admissible witnesses. They have no direct interest in the result of the suit. If the land in question is parcel of the waste, it is so, and the rights of the tenants of the manor are the same, whatever the verdict in this action may be. In *Doe d. Nightingale v. Maisey* (a), it was decided that the mother of a defendant in ejectment, who claimed to retain possession of premises as heir at law to his father, was a competent witness for the defendant, though the effect of her testimony was to prove a seisin in law in her husband, which would give her a claim to dower. Lord *Tenterden* C. J. said, in delivering the judgment of the Court, "If he (the father) was seised, she is equally entitled to dower, whether the premises were in the hands of the defendant or of the lessor of the plaintiff." Any interest the tenants might have in the verdict and judgment

(a) 1 B. & Ad. 439.

was taken away by the indorsement of their names on the record: *Doddington v. Hudson* (a), *Adeane v. Mortlock* (b).

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*Biggs Andrews* (with whom was *Gunning*), in support of the rule. There is a recent case decisive upon this question. In *Doe v. Bamford* (c) it was held that, in an ejectment brought by an assignee of a mortgage made by the defendant, a party who had taken a later mortgage was not a competent witness for the defendant. [Lord Denman C. J. *Doe v. Maisey* (d) does not appear to have been cited.] It is distinguishable; the mother of the lessor of the plaintiff could not directly obtain her dower by the son getting into possession. (He was stopped by the Court.)

LORD DENMAN C. J.—I think we are bound by the authority of the case of *Doe v. Bamford* (c), which is distinguishable from *Doe v. Maisey* (d), because in the latter an intermediate process would be required to give the witness her dower. In this case the lessor of the plaintiff claims the land in respect of a title which, it is conceded by him, will give certain rights to the witnesses; if he obtains his rights they get at the same time theirs; that, I think, must be taken to be a direct interest in the result of the suit.

PATTESON J.—This case is on all fours with *Doe v. Bamford* (c), except that in that case the witnesses were called by a party who wanted to keep possession; and in this they are called by a party who wants to obtain it.

WILLIAMS J.—The witnesses had a direct interest in increasing the commonable ground.

COLERIDGE J.—The witness in effect comes to prove

(a) 1 Bing. 257; S. C. 8 Moore, 163. (c) 11 A. & E. 786; S. C. 3 P. & D. 498.

(b) 5 Bing. N. C. 236; S. C. 7 Scott, 189. (d) 1 B. & Ad. 439.

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himself entitled to part of the land. Suppose the lessor of the plaintiff had agreed with the witness to give him a lease of the land sought to be recovered, could it be contended he was competent? I cannot see any difference between that case and this.

G.

Rule absolute.

Friday,  
 June 3d.

HOGGINS, LEARY and BAGSHAW *v.* GORDON and others.

An arbitrator may maintain an action on an express promise to pay him the costs of a reference.

The following allegation of the consideration of such a promise, "in consideration that the plaintiffs, at the request of the defendants, would take upon themselves the burthen of the said reference," was held sufficient on special demurrer to the declaration.

**ASSUMPSIT.** The declaration stated that, heretofore and before the the time of the making of the promise by the defendants, a certain cause was depending in the Court of Common Pleas, wherein the now defendants were plaintiffs, and one *Gawen* was defendant. That, before the promise, to wit, on the 7th December, 1840, one of the judges of the Court of Common Pleas, with the consent of the now defendants and *Gawen* the defendant in that cause, ordered that all matters in difference between the parties (with the exception of one particular matter) should be referred to the arbitrament of the two plaintiffs *Hoggins* and *Leary*, and such third person as they should by writing under their hands appoint, or of any two of them; the costs of the cause to be paid by the defendant in that suit, and the costs of the reference and award to be in the discretion of the arbitrators, or any two of them; the order to be made a rule of Court.

A declaration on a promise by the defendants to pay the arbitrators such costs, in such manner and at such times as the arbitrators should direct, stated that the arbitrators awarded that the defendants should pay a certain sum as costs immediately after the execution of the award, whereof the defendants had notice.

*Held*, on special demurrer, that the award was to be construed to mean that the costs were payable within a reasonable time after the execution of the award; that they were payable on notice, and that it was not necessary that the declaration should aver a special request to pay.

A declaration stated that a cause was referred to the arbitrament of *A.* and *B.* and such third person as they should appoint, or of any two of them; that *A.* and *B.* appointed *C.*, of which the defendant had notice, and that in consideration that *A.*, *B.* and *C.* would take upon themselves the burthen of the reference, the defendant promised to pay them their reasonable costs of the award, that they proceeded and made their award, ordering defendant to pay them their costs.

*Held*, that the three arbitrators could sue on this as a joint contract.

And thereupon afterwards, and before the promise, by a memorandum in writing, bearing date the 5th January, 1841, under the hands of the two plaintiffs *Hoggins* and *Leary*, and made before *Hoggins* and *Leary* entered on the said matters in difference, *Hoggins* and *Leary* did duly nominate the plaintiff *Bagshaw* to be the third arbitrator, to whom, together with the plaintiffs *Hoggins* and *Leary*, the matters in difference between the parties should be referred, of all which premises the defendants then had notice. And thereupon the defendants afterwards, to wit, on the same day and year last aforesaid, in consideration that the plaintiffs, at the request of the now defendants, would take upon themselves the burthen of the said reference, undertook and promised the plaintiffs to pay the plaintiffs their fair and reasonable costs of the award, in such manner and at such times as the plaintiffs as such arbitrators should by their award in writing direct and appoint. That the plaintiffs, confiding &c., did then accept and take upon themselves the burthen of the said reference. That on the 19th February, 1841, they duly made and published their award concerning the matters in difference so referred to them as aforesaid, ready to be delivered to the parties, and did thereby, amongst other things, award, order and direct, that the costs of the award of the plaintiffs, amounting to the sum of 191*l.* 19*s.*, should be in the first instance paid to them the plaintiffs by the now defendants, immediately after the execution of the award, but that the moiety of that sum should be repaid by *Gawen*, the defendant in that cause, to the now defendants, at the expiration of twelve months from the date of the order, whereof the defendants afterwards, to wit, on the day and year last aforesaid had notice. Yet the defendants not regarding, &c., did not nor would pay the plaintiffs the said sum of 191*l.* 19*s.*, or any part thereof, although the sum of 191*l.* 19*s.* was the fair and reasonable costs of the plaintiffs of the said award, and although a reasonable time

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for the payment thereof had elapsed before the commencement of this suit, &c.

Special demurrer. The most material grounds of demurrer were, that the count does not contain any proper or sufficient averment of the time when the plaintiffs *Hoggins* and *Leary* nominated the plaintiff *Bagshaw* to be the third arbitrator.

That the count does not disclose any agreement or promise legally binding on the defendants, there being no consideration shewn legally sufficient to support the alleged promise of the defendants, as it appears that the plaintiffs, at the time of the alleged promise of the defendants, had already taken upon themselves the burthen of the said reference, the plaintiffs *Hoggins* and *Leary* having before that time, in exercise of their authority as arbitrators under the order, nominated the plaintiff *Bagshaw* to be the third arbitrator, a power which they could not have had or exercised unless they had already accepted the reference and become the arbitrators under it, and, as it is not alleged that they had refused to proceed with the reference, their promise to do that which they had already done is not a sufficient consideration to support the alleged promise of the defendants.

That, in order to render the defendants liable on such a promise as that alleged, the plaintiffs should have undertaken and agreed to proceed in the reference, and use their reasonable exertions to make an award on the matters in difference. That in addition to the said alleged consideration for the defendants' promise being bad, as past or executed, it is utterly valueless and wholly insufficient to support the alleged promise of the defendants, as the plaintiffs might have refused to proceed on the reference the very next moment after they had taken upon themselves the burthen of it, or they might have so refused at any stage of the proceedings, without rendering themselves liable to the defendants for so doing, the plaintiffs not having bound themselves to proceed with the reference, or

to make an award, or to do any other act than merely take upon themselves the burthen of the reference, which they could instantly afterwards have thrown off.

That as arbitrators are not legally entitled to remuneration as such, unless under an express agreement to remunerate them, such express agreement, if it existed, should have been set forth clearly and with certainty, so that the Court could judge of its legal sufficiency, and the defendants know precisely the nature of the demand against them, whereas the contract alleged is so ambiguously and insensibly set forth, that it is impossible to determine what is its precise legal nature, or what answer can with safety be made to the alleged demand upon it.

That it is not alleged that the defendants were ever requested to pay the amount of costs so awarded to be paid by them, nor is it in any manner alleged that the plaintiffs tendered or offered, or that they were ready and willing on receiving the costs to deliver to the defendants, or to allow the defendants to receive the award, or that they the defendants could on payment of the costs have had the possession of the award, or been able to avail themselves of it in any manner.

Joinder in demurrer.

*Bovill* in support of the demurrer (a). 1. The present action is no more maintainable than an action for fees by a physician or barrister. It has been decided that an arbitrator cannot maintain such an action; *Virany v. Warne* (b), *Burroughes v. Clarke* (c); his remedy is by attachment; *Hicks v. Richardson* (d). [*Patteson J.* referred to the opinion expressed by *Dallas C. J.*, in favour of the arbitrator's right to recover compensation, in *Swinford v. Burn* (e).]

2. The consideration for the promise is so vaguely stated,

(a) The case was argued before  
Lord Denman C. J., *Patteson*,  
*Williams and Coleridge Js.*

(b) 4 Esp. 47.

(c) 1 Dowl. P. C. 48.

(d) 1 B. & P. 93.

(e) Gow, 7.

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that it is impossible to say it amounts to any certain and valuable consideration. It appears that two of the arbitrators had already entered upon the reference, by appointing the third arbitrator, before the alleged promise was made. Afterwards the consideration is alleged as an executory consideration. Yet it does not appear that the arbitrators were bound to proceed to make an award, for it is not alleged that they entered into any undertaking to make an award. The alleged consideration, therefore, as an executory consideration, is of no more value than forbearance for an indefinite time, and is therefore bad on that ground, as well as for uncertainty : *Rol. Abr. Action sur Case*, 23, pl. 26 & 27, *Philips v. Sackford* (a), *Tolhurst v. Brickinden* (b), *Figes v. Cutler* (c). In *Hardres v. Prowd* (d), the declaration stated, that in consideration that the plaintiff, at the request of the defendant, *had* taken pains to reconcile differences between the defendant and J. S., the defendant promised to pay the plaintiff 100*l*. That declaration therefore was free from the present objection, for the consideration was definite and past, and the defendant himself had put a value on the plaintiff's services.

3. The plaintiffs have, at all events, no joint right of action. The labour of each was separate, and there was no joint appointment of the three.

4. Assuming that the agreement, if properly performed, would give a right of action against the defendants, the declaration discloses no sufficient performance, for the order on the defendants to pay the costs immediately after the execution of the award, which would be a fact within the knowledge of the plaintiffs exclusively, was an order upon the defendants to do that which was in its nature impossible and inconsistent with the agreement. The notice which it is alleged the defendants had was merely accidental, so far as regards the requirements of the award itself, and cannot therefore supply the inherent defect in the award.

(a) *Cro. Eliz.* 455.

(b) *Cro. Jac.* 250.

(c) 3 *Stark. N. P. C.* 139.

(d) *Styles*, 465.

But assuming that the alleged promise of the defendants may be taken as if it were alleged to have been a promise to pay in reasonable time, then the declaration is bad in substance, because it does not aver a special request to the defendants to pay; 1 Chit. Pl. 330, (6th ed.); *Bach v. Owen* (a).

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He also objected that there was no proper averment of the time of the appointment of the third arbitrator, and that the declaration should have averred the readiness of the plaintiffs to deliver the award.

*Peacock* contra. It is unnecessary to consider whether an arbitrator can recover on an implied promise, because this declaration relies upon an express promise. There is nothing illegal in such a promise, for an arbitrator may detain his award until payment, or proceed by attachment. On principle, therefore, such a promise may be the ground of action.

A sufficient consideration is alleged. The adequacy of the consideration is, of course, immaterial; *Wilkinson v. Oliveira* (b), *Traver v.* — (c).

It often happens that the consideration while executory cannot be enforced, yet when executed it is nevertheless sufficient to sustain a promise; as if 100*l.* be promised to A. in consideration of his going to York, although he is not bound to go to York, yet if he do go there he may sue for the 100*l.* But it is clear that the plaintiffs did bind themselves to proceed to an award, for the consideration alleged is, that "the plaintiffs would take upon themselves the *burthen* of the said reference," the defendant undertook to pay the costs of the said award. In *Payne v. Wilson* (d) the agreement was, "the plaintiff having consented to suspend proceedings, &c. I promise to pay 30*l.* on account of the debt on the first day of April:" it was held that the consideration of the promise was sufficient,

(a) 5 T. R. 409.

(c) Sid. 57.

(b) 1 Bing. N. C. 490.

(d) 7 B. & C. 423; S. C. 1 M. & R. 708.



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because it must be taken as a consent to suspend proceedings, at least, until the 1st April.

The order to pay the costs "immediately" after the execution of the award, must be understood to mean "within a reasonable time afterwards." The defendants received notice of the execution of the award, and no special request was necessary, for they are called upon to pay their own debt and not a collateral sum; *Gibbs v. Southam* (a), *Birks v. Trippett* (b).

The time of the appointment of the third arbitrator is sufficiently averred, for the date of the instrument by which they were appointed is given, and it must be taken that the instrument was executed on the day of the date: *Giles v. Bourne* (c). But the appointment was mere inducement and not traversable, and therefore no date was necessary: *Stephen on Pleading*, 344, (2nd ed.). And, besides, if they contracted with the three plaintiffs it was not competent to them to traverse the appointment.

The readiness to deliver the award is sufficiently averred; the declaration states the award was ready to be delivered.

*Bovill* in reply. *Payne v. Wilson* (d) is in favour of the defendants, for the very foundation of the decision is, that there was a contract to forbear for a time certain. It is said to be of common occurrence in executory contracts, that the performance of the consideration cannot be enforced, yet that after performance of it there is a right of action for breach of the other side of the contract, but the great difficulty here is, that it does not appear with any common certainty what the consideration is.

Even where the sum is not collateral, a request is necessary, if the sum is payable not immediately, but within a reasonable time.

*Cur. adv. vult.*

(a) 5 B. & Ad. 911; 3 N. & M.  
603.

(b) 1 Saund. 32.

(c) 6 Mau. & S. 73.

(d) 7 B. & C. 423; S. C. 1 M.  
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LORD DENMAN C. J. in Trinity Vacation (June 25) delivered the judgment of the Court as follows:—This was an action of *assumpsit* for work and labour by two arbitrators and an umpire against defendants, whom their award required to pay the costs of the reference, these costs being left in their discretion. Numerous objections were taken on special demurrer.

One of them was, that such an action will not lie, as the remuneration of an arbitrator, like that of a physician or barrister, is left to the option of his employers, and cannot be enforced. But it was properly admitted in the argument, that where there is an express promise to pay, such an action may be maintained. But the consideration was said to be badly alleged in these terms, “in consideration that the plaintiffs would take upon themselves the burden of the said reference.” We are however of opinion that these are intelligible words, and describe a known duty, the non-performance of which would excuse defendants from paying, but which is averred and not denied to have been performed by proceeding to hear and award upon the matter in dispute.

Another point was, that the award of these costs is altogether bad, requiring defendants to pay them immediately after the execution of the award. But we think that words of this nature must be construed with a reasonable allowance. The costs became payable on notice to defendant, and such notice is averred.

A more substantial objection seemed to be, that there is no joint right in these plaintiffs to sue defendants for the costs. The order of reference named the two arbitrators, and gave them power to nominate an umpire; and they, in the first place, proceeded to nominate the plaintiff thirdly named, of which it is averred that defendants had notice, and made their promise to all three to pay them their fair and reasonable costs, in consideration of their taking upon them the burden of the reference. The plaintiffs then agree to act jointly, and the defendants promise to them

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jointly to pay them costs. The plaintiffs aver a joint performance of their promise and an award by all that the defendants should pay to all. This is clearly a joint contract.

D.

Judgment for the plaintiffs (a).

(a) As to an action for fees by a physician, see *Veitch v. Russell*, post, 3 G. & D. (Mich Vac.)

The QUEEN v. The Inhabitants of FLOCKTON (b).

A general ground of appeal, stating that the examination, on which an order of removal has been made, "is bad on the face thereof," enables the appellants to object that the examination contains no sufficient statement of the pauper's residence in the appellant parish to shew that he has gained a settlement there.

An examination of a pauper, stating "My indentures were assigned to G. W. of Flockton, with whom I went and resided with three or four years, when I left him," contains no sufficient

ON appeal to the West Riding Quarter Sessions, in April, 1842, against an order for the removal of *James Chambers*, his wife and children, from the township of Barnsley to the parish, township or place, of Flockton, both in the said riding, the order was confirmed, subject to the opinion of this Court upon a case.

The case set out the examination of the pauper, which was the only examination taken. The following is the material part of the pauper's examination: "I was put a parish apprentice to *Thomas Burton* of Derby; and, after residing with him for a few months, my indentures were assigned to *George Walker* of Flockton, in the said riding, with whom I went and resided with three or four years, when I left him."

The following were the grounds of appeal.

"1st. That the said order, and the examination upon which the same was made, are bad on the face thereof respectively.

"2ndly. That the said *James Chambers*, the pauper, never was put out a parish apprentice to *Thomas Burton* of Derby, and afterwards assigned to *George Walker* of Flockton, as stated in his examination accompanying the said order, nor was he ever at any time an apprentice to the said *Thomas Burton* by indenture duly bound, nor did he ever serve as such.

(b) Decided in Easter term, 1843 (April 26).

avertment of the pauper's residence in Flockton for forty days, because, even if "*G. W. of Flockton*" meant that *G. W.* was resident in Flockton at the time of the assignment, the examination did not shew that he continued to reside there afterwards.

" 3dly. That the said *James Chambers*, the pauper, never was legally assigned, as an apprentice either by the assignment of his indenture or otherwise, to the said *George Walker* of Flockton, nor did he ever serve as such an apprentice in our said township of Flockton.

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" 4thly. That the said pauper never did any act to gain a settlement in our said township of Flockton at any time heretofore."

On the hearing of the appeal, the counsel for the respondents stated his case. At the close of that statement, and before any evidence was received, the counsel for the appellants submitted that the Court ought to quash the said order of removal for the insufficiency of the examination whereon the same was made, as alleged in the first ground of appeal. The sessions held that the order was good, and the examination sufficient on the face thereof, and accordingly proceeded to hear the appeal. (The case then stated the evidence given before the removing justices and the sessions with respect to the indenture (a)).

The sessions confirmed the order of removal, subject to the opinion of this Court on the objection taken by the appellants.

If the Court shall be of opinion that the examination is sufficient on the face thereof, then the order of removal and the order of sessions to stand confirmed.

If the Court shall be of opinion that the examination is insufficient, then the order of removal and the order of sessions are both to stand quashed.

Sir *G. Lewin*, in support of the order of sessions. It does not appear, from the first ground of appeal, in what respect the examination is insufficient.

*Pashley* stated his objection to the examination. It does not appear that the pauper resided at Flockton, so as to

(a) The ground taken by the Court in delivering judgment has rendered this part of the case immaterial.

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gain a settlement there. [*Patteson, J.* That objection is not pointed out in the grounds of appeal.] It is not necessary that it should be pointed out specially; it is an objection of substance, inasmuch as residence is an essential ingredient in the settlement. The objection, therefore, is properly the subject of general demurrer. In *Reg. v. Middleton in Teesdale (a)*, the examination was defective in not stating for how long a period the renting was, by which the settlement was alleged to have been acquired; and it was held that, under the general demurrer to the examination, the appellants might take advantage of this defect. In *Reg. v. Stapleford Fitzpaine (b)*, which may be relied on by the respondents, there was not only the general demurrer to the examination, but several grounds of special demurrer, which were calculated to lead the respondents away from the objection intended to be insisted upon; and the objection itself was, not that the examination failed to set out all the constituent facts of the settlement, but that one of such facts, namely, the rating of the pauper's father, had not been proved by legal evidence. The Court, therefore, properly said in that case that the general objection to the insufficiency of the examination conveyed no information in itself of the ground of appeal intended to be relied on, and was besides preceded by a denial of the *fact* of rating only, and followed by other specific objections, which were equally remote from the objection to the *evidence*.

Under this general ground of appeal, then, the appellants have a right to object to the examination, if it does not shew that the pauper resided for forty days in Flockton. Now the statement, "My indentures were assigned to *George Walker* of Flockton, with whom I went and resided with three or four years," does not shew this. The very point has been recently decided by *Patteson J.* in *Reg. v. Justices of the West Riding (c)*. In that case the examination stated that the pauper was bound apprentice to *W. T.* of *D.*, and that he "went to and served and resided with *W. T.*"

(a) 3 P. & D. 473.

(b) 1 G. & D. 605.

(c) 12 Law J. (M. C. 1843), 37.

of D. for about three years and a half." It was held, that this was no sufficient statement of the pauper's residence for the proper period in D.; and *Patteson J.* observed, "Giving full effect to the argument as to the meaning of the word 'of,' and assuming that the pauper was bound apprentice to *W. T.* of the township of D., that is, residing in the township of D., still it is perfectly consistent that *W. T.* may have removed to another place before the pauper went to him."

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*Sir G. Lewin* contra. The word "of" was held by this Court, in *Reg. v. Toke (a)*, to be a sufficient statement of a party's residence within a county to bring him within the jurisdiction of the justices of that county. But the general ground of appeal furnished by the appellants in this case gave no intimation that they meant to object to the examination in this respect; and this Court has repeatedly held, that parishes must give to each other the most explicit information. On this point, *Reg. v. Stapleford Fitzpaine (b)* has overruled *Reg. v. Middleton in Teesdale (c)*.

*Pashley.* In *Reg. v. Ecclesall Bierlow (d)*, the general objection to the insufficiency of the examination was considered sufficient to let the appellants even into the special objection that certain facts stated in the examination had been proved by hearsay evidence.

**LORD DENMAN C. J.**—This case must be governed by *Reg. v. Middleton in Teesdale (c)*, and is distinguishable from *Reg. v. Stapleford Fitzpaine (b)*. The latter case is clearly distinguishable; particular objections were taken, which pointed to any thing rather than to the objection on which the appellants wished to rely; and the objection there was, that the evidence of the fact in dispute was imperfect, and not, as here, that there was no evidence of it whatever. We may, therefore, inquire into the sufficiency of this examina-

(a) 3 N. & P. 323.

(c) 3 P. & D. 473.

(b) 1 G. & D. 605.

(d) 1 G. & D. 160.

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tion. I am of opinion that there is no proper averment of the pauper's residence in Flockton, so as to give him a settlement there. In *Reg. v. Toke* (a), it was enough for the order of justices to shew that it was made upon a party who was resident in their county at the time when the order was made.

PATTESON J.—I cannot distinguish this case from *Reg. v. Middleton in Teesdale* (b). In that case the appellants were permitted, under a general demurrer to the sufficiency of the examination, to object that it did not appear for what time the tenement had been rented. Admitting every statement in the examination to be true, the examination did not go far enough to shew that any settlement had been gained. So in this case the examination does not go far enough, unless it shews that the pauper resided for the necessary period in Flockton. It has been argued that the word "of" is sufficient to sustain this examination, because, it is said, the words "*George Walker of Flockton*" signify that *Walker* resided at Flockton; and the examination goes on to state that the pauper resided with *Walker*. It appears, too, that in *Reg. v. The Justices of West Riding* (c), I doubted whether the words "of Darton" signified residence in Darton. But, assuming the word "of" to have that effect in this examination, the utmost it shews is, that *Walker* resided at Flockton at the time of the pauper's assignment to him; for the examination does not say when the pauper "went and resided with" *Walker*, or that "he went and resided with" *Walker there* at any time whatever.

WILLIAMS J.—This case falls within *Reg. v. Middleton in Teesdale* (b), which shews that the general ground of appeal, "that the examination is bad on the face thereof," will let in the appellants to take advantage of any fatal defect apparent on the examination. I think there is no pretence for saying that the words "my indentures were assigned to

(a) 3 N. & P. 323.

(c) 12 Law J. (M. C. 1843), 37.

(b) 3 P. & D. 473.

*George Walker of Flockton*, with whom I went and resided with three or four years, when I left him," mean that the *pauper* resided with *Walker* in Flockton for forty days. It seems that in *Reg. v. Toke* (a) *Patteson* J. doubted whether "of" did import residence; and *Littledale* J. thought it did not. I should say that "*George Walker of Flockton*" formed rather part of the man's description, and that it did not denote his local residence in Flockton. But suppose the pauper did go the very day he was assigned to *Walker*, being then a resident in Flockton, *Walker* might have left Flockton the next day, and resided elsewhere for the rest of the period. The words used in this examination may be thought out of doors to have the meaning contended for; so may the word "occupy," on which we have observed in former cases. But this is not enough, we require legal certainty.

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Order of Sessions quashed (b).

(a) 3 N. & P. 323.

(b) See the next case. In the course of the argument in this case an objection, that the examination did not shew that the indenture of apprenticeship had been produced

before the removing justices, was adverted to; *Patteson* J. intimated that it would be convenient that an objection of this kind should be specially pointed out in the grounds of appeal.

D.

The Queen v. The Inhabitants of ST. MARGARET'S,  
 ROCHESTER (c).

ON appeal to the Rochester Borough Sessions, for Michaelmas, 1842, against an order for the removal of *Rachael Smith*, widow, and her children, from the said parish of St. Margaret to the parish of Strood, also in

On a case from the quarter sessions it was held that the following examination did not shew that either the pauper or her

(c) Decided in Easter Term, 1843, (April 26.)

husband had resided in S. for forty days:—

"About sixteen years ago my husband and I went to live at a house in S., which I hired of, &c. for 11*l.* a year. My husband and I occupied it from that time till his death, which happened about nine years back. I have seen my husband pay rent for this house many times. He paid it at the house. I continued to occupy this same house until 1841, when I came to the house I am now residing in."



1842.  
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 St. MARGA-  
 RET'S,  
 ROCHESTER.

Rochester, the order was quashed, subject to the opinion of this Court upon a case.

The case set out the examination of the pauper *R. Smith*, the material part of which was as follows:—

“About sixteen years ago my husband and I *went to live* at a house in Caroline Place, in the parish of Strood, in the city of Rochester, which I hired of *E. A. of Strood* aforesaid, coal merchant, for 11*l.* a year. My husband and I *occupied* it from that time until his death, which happened about nine years back. I have seen my husband pay rent to *W. P.* for this house many times. He paid it quarterly to *P.* at the house. I continued to occupy this same house until March, 1841, when I came to the house I am now residing in.”

The following was the ground of appeal applicable to this part of the case:—That it does not appear upon the said examination that *R. Smith*, or her husband therein named, ever resided for forty days in the house in Caroline Place, &c.

On the trial of the appeal, before any evidence was heard, the appellants insisted that the order of removal should be quashed, because there was no express statement in the examination that the pauper's husband in his lifetime, or the pauper since his death, ever resided for forty days in the house in Caroline Place, or elsewhere, in the parish of Strood. The respondents, on the other hand, contended that those facts sufficiently appeared from the statements contained in the examination, and that, such being the case, no precise form of words was necessary to convey that information. The Court decided in favour of the objection, and quashed the order of removal.

If the Court of Queen's Bench should hold the objection good, the order of sessions to be confirmed, if the Court should be of a contrary opinion, the case to be sent back to the sessions to be heard on the merits.

*Bodkin*, in support of the order of sessions, referred to

*Reg. v. Justices of the West Riding (a).* [He was then stopped.]

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*Brett* and *Rose* contra. The examination is the language of the pauper, and not to be construed with legal nicety, but with reasonable intendment. This rule of construction has been applied even to a conviction: *Rex v. Crisp (b)*. In the case cited for the appellants, and in other cases decided by this Court, there has been nothing but the word "occupy" to denote residence; here the residence appears from the whole tenor of the examination. The pauper says she "went to live" in the house, and "occupied it from that time," and "I have seen my husband pay rent at the house;" and the pauper says, she "continued to occupy the house" until "I came to the house I am now residing in."

Lord DENMAN C. J.—I consider this case to have been decided in *Reg. v. The Justices of the West Riding (a)*.

PATTESON and WILLIAMS Js. concurred.

D. Order of sessions confirmed (c).

(a) 1 G. & D. 706.

(c) See the preceding case.

(b) 7 East, 398.

The QUEEN v. The Inhabitants of St. PANCRA'S (d).


ON appeal to the Middlesex Quarter Sessions against an order of *E. H. Maltby*, Esq. for the removal of *Eliza*

An order of removal was obtained on the 26th May, and served on the following day.

(d) Decided in Hil. T. 1843, (Feb. 4.)

On the 13th of June the parish, which had obtained the above order, having discovered that the examinations, on which it was made, were defective, obtained a fresh order of removal to the same parish on fresh examinations. This order, which was served the following day, contained notice of abandonment of the former order. The former order had not been executed by the removal of the pauper.

*Held*, that it was no ground of appeal against the second order, that, at the time of making it, the first order had not been discharged, countermanded, or abandoned, either by notice or by supersedeas.

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*Stenson* and child from the parish of St. Giles, Middlesex, to the parish of St. Pancras in the same county, the sessions confirmed the order, subject to the opinion of this Court on a case.

The case contained a statement of the following facts :—


On the 27th May, 1842, the appellant parish received from the respondent parish an original order under the hand and seal of *John Hardwicke*, Esq., and also a notice of chargeability and copy of examinations, all of which bore date the 26th May, 1842. These documents all had reference to the same paupers, and the order was for the removal of them from St. Giles's to St. Pancras, the same parish appealing against the present order. Against the order of the 27th of May, no notice of appeal was given before the 14th day of June ensuing, nor on that day, nor since.

On the 14th June another order of removal, made by Mr. *Maltby* on the 13th June, was received by the appellants. This was the order appealed against, and was an order for the removal of the same pauper, for whose removal the former order was made, from the parish of St. Giles to the parish of St. Pancras. Annexed to this second order was a notice of chargeability, of the date of the 13th June, and in substance the same as that accompanying the first order, and also the examination on which the last-mentioned order was founded, and the only variance between the two examinations was, that in the first, the service, through which the settlement was claimed, was said to have expired in October, 1832, while, in the second, it was correctly stated to have expired in October, 1833; in all other respects the orders and examinations were exactly the same. Below the second examination was a notice of appeal, of which the following is a copy :—

“ To the churchwardens and overseers of the parish of St. Pancras in the county of Middlesex. Order of removal of *Eliza Stenson* and child, dated 26th May, 1842.

“ It appearing to us, that the examination upon which the former order of removal above mentioned, in the case

of *Eliza Stenson* and child, was made, in some respects was erroneous, we do hereby forego and abandon the said order of removal, bearing date the 26th day of May, 1842, and shall abstain from the execution thereof. Given under our hands this 13th day of June, 1842." (Signed by the churchwardens and overseers of St. Giles.)


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No notice relating to the first-mentioned order of the 26th of May, 1842, (except the notices above stated,) was given to the appellants previously to the making of the second order of the 13th June, 1842. The same two paupers are the subject of both orders, and have been removed to the appellant parish.

Against the second order of removal, a notice of appeal was on the 1st October last duly served on the respondents, and amongst other grounds of appeal were the following. Then followed two grounds of appeal, which were, in substance, that at the time of the making the order of the 13th June, 1842, there was subsisting an order of *Mr. Hardwicke* of the 26th May, 1842, for the removal of the same paupers from the same parish to the same parish.

It was contended at the sessions by the appellants, that at the time of making the second order by *Mr. Maltby* the first order of *Mr. Hardwicke* was a good, valid and subsisting order, and that until the first order was discharged, countermanded, or abandoned, either by notice to that effect, actually given to the parish affected, or by superseas, *Mr. Maltby* had no jurisdiction to make the second order, and that it ought to be quashed. The respondents contended, that they had taken no steps for the execution of the first order, and that, until the execution of the first order, a second order, as in this case, might be made.

The question for the opinion of the Court is, whether *Mr. Maltby*, the second magistrate, had jurisdiction to make and did make a valid order on the 13th June, 1842, when the order of *Mr. Hardwicke*, of the 26th May, 1842, had been served, and when, at the time of making the second order, the first order had not been countermanded, abandoned, discharged or superseded.

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If the Court shall be of opinion that Mr. *Maltby* had such jurisdiction, and that the order of the 13th June, 1842, is valid, such order and the order of sessions are to be confirmed; if of a contrary opinion, the appeal is to be allowed.

*Adolphus* was heard in support of the order of sessions (a).

*Prendergast* and *Howorth* contra.

*Cur. adv. vult.*

LORD DENMAN C. J. in Hilary vacation (February 4) delivered the judgment of the Court as follows:—An order of removal of certain paupers was made by Mr. *Hardwicke*, the police magistrate, and was served by the officers of the respondent parish upon those of the appellant parish. No notice of appeal was given, but the respondents, having afterwards discovered a defect in the examinations, brought the pauper and the witnesses before another justice of the peace, Mr. *Maltby*, and after taking examinations Mr. *Maltby* made his order of removal.

The respondents then gave the appellants notice that they should abandon the former order, and served them with the latter. Against this order the appeal was brought, on the single ground that the former was in force, neither superseded nor discharged, nor abandoned at the time of making the latter.

On the argument we were pressed with the observation that it could not be lawful to remove the pauper to one parish, while another order was actually in force for removing him to a different parish.

We believe this objection to be entirely new, and it was supported by no authority. On consideration we can not consider that it is entitled to any weight. An order of removal is merely a warrant to parish officers to take the

(a) The case was argued in Hilary term, 1843 (Jan. 25), before Lord Denman C. J., *Patteson*, *Coleridge* and *Wightman* Js.

pauper to the parish indicated, and, though it is founded on ex parte examinations of witnesses, that parish may at their discretion abstain from carrying it into execution, because they may either obtain a more accurate knowledge of material facts, or discover some technical defect in the order or the examination on which it issued, or for any other reason.

If the appellant's doctrine is true, the existence of any former order, served on any other parish, would compel the Court to set aside any posterior order for the removal of the same pauper. Even if the orders were inconsistent, we are not prepared to go this length; and, in the present case, where the first order is exactly the same as the second, and even the first examination in no degree inconsistent with the second, the only difference being that it supplies one fact which had been omitted, we are of opinion that such second order of removal was justified by such more perfect examination, and that the sessions had no further inquiry to make.


We have frequently recommended from this place that an objectionable order should be abandoned by those who obtained it, and another, free from objection, applied for. These respondents would have acted better and more in the spirit of our recommendation, if they had given notice of the fact and the motive of such abandonment both to the appellant parish and to the justice who made the order, *before* they applied to another justice of the peace for a second order, and had also mentioned it to the justice of the peace secondly applied to.

But their neglect to do this can not deprive the justice of the peace of his jurisdiction, and nothing but want of jurisdiction could have justified him in refusing to act, or could have authorised the Sessions to quash the order.

D.

Order of Sessions confirmed (a).

(a) See the two next cases.

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The QUEEN v. The Inhabitants of TOWNSTALL (a).

The QUEEN v. The Inhabitants of STAYLEY (a).

Although notice of abandonment of an order of removal has been given, before removal of the pauper and before entry of appeal, and an offer has been made to pay all reasonable costs, the parish, to which the order was directed, has nevertheless a right of appeal against it, for the purpose of getting the proper amount of costs ascertained by the sessions.

Where it is the practice of the sessions to allow an appeal to be entered against an order of removal, on filing a copy of the order, the jurisdiction of the sessions to try the appeal cannot be disputed on the ground that the copy has been taken as evidence without accounting for the original.

ON an appeal against an order, made on the 23d September, 1842, for the removal of a pauper from the parish of Townstall, in the borough of Clifton Dartmouth Hardness, in the county of Devon, to the parish of Stokefleming, in the same county, the sessions quashed the order, subject to a case.

The case stated that, on the 6th October following, the parish of Stokefleming served notice of appeal, and at the same time delivered their grounds of appeal to the parish officers of Townstall. "On the 8th of the same month of October, the respondent's attorney informed the attorney for the appellants that the respondents would abandon the order, and were ready to pay the costs of the appellants, to which no consent was given." On the 11th of the same month a notice was served on the overseers of Stokefleming, stating "that we the churchwardens and overseers of the poor of the parish of Townstall, within the borough of Clifton Dartmouth Hardness, in the county of Devon, do hereby abandon a certain order (describing the above order); and take notice, that we are ready to pay all such lawful and *reasonable costs* as you may have incurred in consequence of such order, and that we shall immediately hereafter proceed to obtain a fresh order," &c. &c.

"The appellant parish would not consent to the abandonment of the order, and on the 12th October an appeal was entered by their attorney with the clerk of the peace for the said borough, for trial at the then following sessions, which were held on the 27th October. At the sessions the respondents insisted that, the order having been abandoned, the appeal should be dismissed. The Court of Quarter Sessions overruled the objection, on the ground that, without the consent of the appellant parish or a super-

(a) Decided in Easter Term, 1843 (April 26).

sedeas, the abandonment was ineffectual. The Court then proceeded to hear the appeal, and quashed the order of removal. If the Court shall be of opinion that the said order of removal had been effectually abandoned, the said appeal shall be dismissed; but, if the Court shall be of a contrary opinion, the said order of removal shall stand quashed."

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*Elliott* in support of the order of sessions. An order of removal is a judgment binding a parish to receive a pauper, and cannot be got rid of by a notice of abandonment, or any other act of the parish, by which the order has been obtained. The sessions therefore were right in hearing the appeal. In *Pancras v. Rumbald* (a), *Rex v. Diddlebury* (b), and *Reg. v. Justices of the West Riding* (c), the former order was set aside by an act of justices. In *Reg. v. Justices of Middlesex* (d) also there was a supersedeas, which was held too late after an appeal had been lodged at the sessions. [Lord Denman C. J. referred to *Rex v. Justices of Cambridge* (e), where it was held that parish officers cannot abandon a poor rate duly made, allowed and published.] In *Rex v. Justices of Norfolk* (f), although the order of removal had been superseded by the magistrates, it was held that the sessions might allow an appeal to be entered against it, in order to compel the respondents to pay costs; and Bayley J. observed, "I think that, in cases like this, the sessions may exercise a discretion, and enter the appeal or not, so as best to answer the purposes of justice." In *Reg. v. St. Pancras* (g) it was not contended that an order of removal could be got rid of by mere notice of abandonment. He referred also to *Rex v. Llanrhydd* (h).

(a) 1 Str. 6.

(b) 12 East, 359.

(c) 1 G. & D. 630.

(d) 11 A. & E. 809; S. C. 3 P. & D. 459.

(e) 2 A. & E. 370; S. C. 4 N. & M. 238.

(f) 5 B. & Ald. 484; S. C. 1 D. & R. 69.

(g) The preceding case.

(h) Burr. S. C. 658.



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*M. Smith* contra. The notice of abandonment was given before removal and before entry of appeal, and was accompanied by an offer to pay all costs. The observation of Lord Mansfield C. J. in *Rex v. Llanrhydd* (a), that there can be no objection to a party abandoning a judgment intended for his own benefit, is cited with approbation by Lord Ellenborough C. J. in *Rex v. Diddlebury* (b), and also by Bayley J. in *Rex v. Justices of Norfolk* (c). Bayley J., in the last mentioned case, after making the observation, which has been relied upon by the appellants, goes on to say, "If the parties removing do not chuse to pay the expenses of maintenance incurred previously to the superseas, they may then enter the appeal, for the purpose of compelling them to do so." The reason therefore of the judgment does not apply to this case, where payment of the costs had been offered before the appeal was entered.

Lord DENMAN C. J.—It will be convenient to hear the next case before coming to a decision.

*Reg. v. Inhabitants of Stayley* involved the same point. On appeal to the quarter sessions for the county of Chester, held on the 27th June, 1842, against an order for the removal of a pauper from the township of Stayley, in the said county, the sessions had quashed the order for want of form, with full costs to the appellants, subject to the opinion of this Court upon a case.

The case stated that the order of removal in question was obtained on the 23d May, 1842, and a copy of it served on the appellant township fourteen days before the sessions next following. The pauper was not removed. On the 23d of June, and in time to prevent the incurring of any further expenses by the appellants going to the sessions, the respondents gave notice to the appellants that they (the respondents) considered the examination, on which

(a) Burr. S. C. 658.

(b) 12 East, 369.

(c) 5 B. & Ald. 484; S. C. 1 D. & R. 69.

the order of removal had been made, bad in point of form, and that therefore they abandoned their order and intended to obtain another order. There was no mention made of paying the costs already incurred by the appellant township in preparing notice of appeal, in subpoenas, journies to examine pauper, preparation of brief for counsel, and many other expenses, nor in fact were any of these expenses paid before the appellants had entered their appeal and obtained the adjudication of the Court of Quarter Sessions, nor had any application for such costs been made, nor notice of any intended application been given until the counsel for the appellants moved for them in Court. Notwithstanding the service of this notice of the abandonment of the order, the appellants at the sessions, on the 27th of June, and without giving respondents any further notice, entered their appeal for trial, having filed with the clerk of the peace *a copy only* of the order of removal, together with a copy of the examinations, &c. When the appeal was called on, the appellants moved to quash the order, which the respondents did not appear to support, and for the costs of the appeal. This application was resisted by the respondents (who were attending sessions on other business), on the grounds that the Court had no jurisdiction in the matter, and inasmuch as *no original* order was before it, and, no notice to produce such original had been given, the order filed as a copy could not be used, and that, after the order had been abandoned for want of sufficiency in the examination, and as the notice of abandonment expressly stated on no other account whatsoever, it could not entertain the appeal for the purpose of quashing the order, which had been already abandoned. The appellants cited the orders of the Court of General Quarter Sessions for the county of Chester, relating to the practice of the Court, by which it was ordered "that all appeals, intended to be tried at any quarter sessions, whether the same shall have been lodged at any prior sessions or not, are to be entered with the clerk of the peace, at the opening of the Court at the sessions, or adjournment,

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at which the same are to be heard, when the *order* or proceeding appealed against, or a *copy thereof*, is to be delivered to him, and no appeal shall be called on for trial, which shall not have been so entered. Appellants submitted that they had complied with the rules and practice of the Court, in giving a copy of the order to the clerk of the peace.

"If the Court of Quarter Sessions had jurisdiction, and were justified in quashing the order appealed against for want of form, with costs, the order of that Court is to stand, if not, to be set aside."

*Townsend* in support of the order of sessions. It would be dangerous to allow a judgment, under the hand and seal of justices, to be set aside by the hand or mere breath of an overseer. It may be impossible, after a lapse of time, to prove the abandonment, whereas the order will always be in evidence, and, not having been appealed against, be conclusive on the parish on which it is made. This inconvenience will be obviated by requiring a regular supersedeas by the magistrates, for then the order will be given up to them and cancelled.

But at all events the omission to tender costs to the appellants justified the sessions in hearing this appeal, for the appellants had no mode of getting their costs except through a judgment of the sessions. The judgment of the Court in *Reg. v. Brighthelmstone* (a) applies to this point. "The dates of the proceedings, the facts of the supersedeas, and of the notice of abandonment, raised for the sessions a question of costs, and of the terms on which the appeal should be settled."

*Pashley* contra. The costs spoken of in *Rex v. Justices of Norfolk* (b) and *Reg. v. Justices of West Riding* (c), are the costs of maintenance. Here the pauper had not been

(a) 2 G. &amp; D. 88.

(c) 1 G. &amp; D. 630.

(b) 5 B. &amp; Ald. 484; S. C. 1 D. &amp; R. 69.

removed, and no such costs had been incurred. With regard to the observation of *Bayley J.*, in *Rex v. Justices of Norfolk (a)*, as to the sessions having a discretion to allow an appeal to be entered or not, it is submitted that a party must either have a right of appeal or not, that the sessions can exercise no option in the matter, and that after the abandonment of an order there is no right of appeal against it. The appellants never demanded costs.

Secondly, the filing a copy of the order of removal, without accounting for the absence of the original, could not give the sessions possession of the appeal: *Reg. v. Justices of Sussex (b)*. [*Patteson J.* It seems in that case that the production of the order became necessary in the course of the trial.] The object of producing the order is immaterial. The rule requiring an original document to be accounted for before secondary evidence of it can be admitted is universal, and cannot be superseded by the rules of practice at sessions.

LORD DENMAN C. J.—I think the observation of *Bayley J.*, that the sessions in certain cases have a discretion to allow an appeal to be entered or not, cannot be supported. A party has a right to try his appeal, if he has a proper case. We have recommended the abandonment of orders, where it is discovered that they cannot be maintained, but it is much to be lamented that there is no power of securing the proper costs, payable on such abandonment, without allowing an appeal to the sessions. For this reason I think we are bound to say that the parish, against which an order has been made, has a right to go to the sessions for costs. We are upon strict legal rights.

I do not see any thing in the other objection.

PATTESON J.—I should wish to afford every facility to the abandonment of an order of removal, which has been

(a) 5 B. & Ald. 484; S. C. 1 D. & R. 69. (b) 9 Dowl. P. C. 125.

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obtained on imperfect materials. But the question of costs necessarily creates a difficulty in such cases. In the first of these cases there was an offer to pay "reasonable costs." But no particular amount of costs was mentioned, and I do not see how the amount can be ascertained, except by a competent Court.

WILLIAMS J.—The offer was to pay "reasonable costs." How was it to be ascertained what were reasonable costs, without taxing them. The refusal of the offer does not vary the case.

D.

Order of Sessions confirmed.

The QUEEN v. The Inhabitants of HULME (a).

By 4 & 5 W. 4, c. 76, s. 66, it is enacted, that "no settlement shall be acquired by occupying a tenement, unless the person occupying the same shall have been assessed to the poor rate, and shall have paid the same, in respect of such tenement, for one year."

In the form of a poor rate the column headed with "name of owner" was filled up with

the name of the owner; the column headed "name of occupier" was not filled up with any name. A pauper occupied the house so rated; the rate was demanded of him by the parish officer and pauper paid it.

Held, that he was sufficiently "assessed" to gain a settlement, though his name did not appear on the rate.

ON appeal to the Quarter Sessions for the borough of Manchester, against an order for the removal of *Joseph Gray* and his wife from the township of Hulme to the township of Manchester, both in the said borough of Manchester, the order was quashed, on the ground that the settlement of the paupers was in the township of Chorlton-upon-Medlock, but subject to the opinion of this Court upon the following case:—

It was admitted that the paupers had been entitled to a settlement in the township of Manchester, but it was contended on the part of that township that the pauper *J. Gray* had subsequently acquired a settlement in the township of Chorlton-upon-Medlock, by occupying and renting a house in Temple Street, in the township of Chorlton-upon-

(a) Decided in Easter term, 1843, (April 26.)

Medlock, at the annual rent of 28*l.*, for the period of one year and upwards during the years 1838, 1839 and 1840, in some or one of them, and by being assessed to the poor rate, and by having paid the poor rate in respect of such tenement for one whole year. It was proved that the pauper occupied and rented the house at the rent aforesaid from June, 1838, to December, 1839, and paid the rent for such period. It also appeared that in the assessment for the poor rate of the township of Chorlton-upon-Medlock, which was made and allowed on the 19th July, 1838, the house which the pauper so occupied in Chorlton-upon-Medlock was entered, but not the name of the tenant—the entry being as follows. (The case then set out the form of the rate.) The column headed “name of owner” was filled up with the name of the owner, but the column headed “name of occupier” was not filled up with any name; under the column head “description of property rated” was the word “house.” Under each of the columns headed respectively “total amount to be collected” and “amount actually collected” was entered the sum of 1*l.* 5*s.*

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It also appeared that 1*l.* 5*s.*, the rate charged in that entry, was demanded from the pauper, and paid to the collector of the poor's rate by or on behalf of the pauper on the 4th of May, 1839. In the rate or assessment for the next year, which was made on the 4th of May, 1839, and allowed on the 16th of July, 1839, the name of the pauper was inserted in the rate, the entry being as follows. (The case then set out the form of the rate.)

But the rate charged by the last assessment was never paid by the said pauper.

If the Court should be of opinion that from the facts above stated the pauper may be deemed to have been assessed for the house during the first year of the tenancy, or that by paying the rate for the first year and being assessed for the second year, the provisions of the act of 4 & 5 *Will.* 4, c. 76, have been complied with, the order of the Court was to be confirmed, otherwise the judgment

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of the sessions was to be set aside and the order of removal confirmed.

Crompton in support of the order of sessions. The question is, whether the pauper has been assessed to the poor rate, and has paid the same within the meaning of the 4 & 5 *Will.* 4, c. 76, s. 66, which enacts, that "from and after the passing of this act no settlement shall be acquired or completed by occupying a tenement, unless the person occupying the same shall have been *assessed* to the poor rate, and shall have paid the same in respect of such tenement for one year." The language of this clause is substantially the same as that of 3 *W. & M.* c. 11, s. 6, by which it was enacted that, if a person should "be *charged* with and pay his share towards the public taxes or levies" of a parish, he should be adjudged to have a settlement in the same. The objection in this case is that the pauper was not named in the rate. But it has been decided, under the statute of *W. & M.* that, if the parish have notice of the person really rated, he need not be rated by name. In *Rex v. Walsall* (a) the pauper's name was *Dean*, the rate was "late *Lowbridge's* house;" in *Rex v. Painswick* (b) the pauper's name was *Moorman*, who was tenant to one *Clifford*, and the rate was "*Thomas Clifford* or tenant;" and in *Rex v. Brickhill* (c) a pauper of the name of *Green*, who occupied a place called "*Roscoe's* tenement," was rated as "the occupier of *Roscoe's*." Settlements were gained in all these cases. In *Rex v. Walsall* (a) *Aston J.* observed, "It is agreed that the person must be both rated and pay. Then as to the manner how he is to be rated, it is clear that his name need not be inserted in the rate. If the parish have sufficient notice of him it is enough. Paying under a rating is equivalent to notice, and the officers have received the rate of this man for two or three years. As to the objection that no payment could have been compelled upon this rate, that is

(a) Caldec. 35.

(c) 8 Mod. 38.

(b) Bur. S.C. 465.

perfectly immaterial; for the settlement does not go upon that, but upon its being notice to the parish; and he has fulfilled the two conditions required by the act." In *Rex v. Painswick* (a), *Denison J.* went still further; "he even hinted that rating the house only might, for aught that he saw to the contrary, be sufficient, for the parish could not but know who was the occupier." The rate is *prima facie* always on the occupier, and the parish officers in this case must have known that the pauper was the occupier, for they actually received the rate from him. This circumstance distinguishes this case from *Rex v. Llangamarch* (b), where the house only was rated by name, and the rates were always paid by the landlord, and the case expressly stated as a fact that the overseer knew nothing of the pauper, or whether he resided at the house.

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Martin contra. There is no decision upon the statute now under consideration, and the Court has therefore an opportunity of giving to it a plain and literal construction, a departure from which, in cases relative to the settlement of the poor, was strongly deprecated by *Abbott C. J.* in *Rex v. Turvey* (c). The statutes were intended to prevent persons not known to the parish by name from gaining a settlement. It is clear, from the language of the section in 4 & 5 Will. 4, c. 76, "shall have paid the same," that the assessment and payment, in respect of which a settlement is given, must both apply to the same rate. The second rate in this case was never paid. The question, therefore, is confined to the rate for 1838. *Rex v. Llangammarch* (b) is in favor of the respondents, for in this case there is no evidence that the parish officers knew the pauper to be occupier. The mere receipt of the rate from the pauper is nothing; the officers will receive it from any one who chooses to pay it. The words "shall have been assessed" are much stronger than the words of the 3 W. & M. The

(a) Burr. S. C. 465.

(b) 2 T. R. 628.

(c) 2 B. & Ald. 520.

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word "assessed" has a technical meaning, and seems to point directly to a charging of the pauper by the very form of the rate. The insertion of the owner's name in this rate is an express negative of any assessment on the occupier.

LORD DENMAN C. J.—There is no distinction between the word "charged" in the former statute, and the word "assessed" in this statute. There is no preamble nor any thing else in the 66th section to shew that the name of the party assessed must be inserted in the assessment in order to his gaining a settlement. The section seems to point only to the necessity of his continuing to be rated and to pay rates for a year. The pauper has been charged and has paid rates so as to gain a settlement according to the cases on the former statute.

PATTESON J.—The only question is, whether the present statute is to be construed differently from the former one. I think it is not, and there have been several decisions upon the former statute to shew that a settlement is acquired in a case like this. Whether those decisions were right or not, we will not now interfere with them.

WILLIAMS J.—I am of the same opinion; "assessed" is used as synonymous with "charged." It is sought to introduce into the section the words "assessed by name."

D.

Order of Sessions confirmed.

The QUEEN v. The Inhabitants of ST. MARY,
 NEWINGTON (a).

By 4 & 5 W. 4, c. 76, s. 71, a child born a bastard, after the passing of the act, takes, on the mother's marriage, the settlement of her husband.

ON appeal to the Kent Quarter Sessions, against an order for the removal of *Eliza Marks* (the lawful child of *Mary*

(a) Decided in Easter term, 1843, (April 29).

Ann Marks, the late widow of *William Marks*, deceased), and also two *illegitimate children* of the said *Mary Ann Marks*, from the parish of Cudham, in the said county, to the parish of St. Mary, Newington, Surrey, the order was confirmed as to the illegitimate children, and quashed as to *Eliza Marks*, subject to a case for the opinion of this Court.

On the 15th of November, 1834, the said *M. A. Marks*, being then a widow of one *W. Marks*, whose settlement was in the appellant parish, was delivered of one of the illegitimate children mentioned in the order, and in the year 1837 of the other.


M. A. Marks had gained no settlement in her own right from the time of the death of her husband, which took place about the year 1831, until the 26th August, 1838, on which day she was married to her present husband *S. H. Skeete*, whose settlement is in the respondent parish.

The question for the decision of this Court is, whether the illegitimate children are to have the settlement to which their mother was entitled immediately preceding her second marriage, or whether they are to take the settlement acquired by the mother by reason of such second marriage.

If this Court shall decide that the children are entitled to the settlement acquired by the mother through the second marriage, the order of sessions is to be quashed, otherwise to stand confirmed.

Erle and *Deedes* in support of the order of sessions. The question is upon the construction of the 71st section of 4 & 5 Will. 4, c. 76, which enacts "that every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right; and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as part of her family until such child shall attain the age of sixteen." The sessions have rightly decided that the illegitimate children in question are

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not entitled to the settlement of their mother's second husband. The words "have and follow the settlement of the mother," must be limited to such settlement as *she* may acquire in her own right. If the word "have" only had been used, it might have been supposed that the only settlement, which illegitimate children could take, was such settlement as the mother had at the time of their birth; the word "follow," therefore, was added merely to shew that the original settlement, taken by them at the time of birth, was to be superseded by any other settlement of the mother, which she might afterwards acquire in her own right. The object of the section was to make the bastard follow its mother's settlement so long as the mother was bound to maintain it. But her duty to maintain the bastard ceases on marriage. Her capacity to acquire a settlement also ceases on marriage; so that, if the construction to be contended for on the other side be adopted, on any change of the husband's settlement subsequently to the marriage, the child will follow *his* settlement, and cannot therefore be said, in the language of the statute, to follow the settlement of the *mother*. Section 57 (a) is the section which comes into operation on the mother's marriage. The 71st section has no reference to the mother's coverture; the words "so long as she shall be unmarried or a widow" govern the whole section. But the 57th section expressly provides for the consequences of the mother's marriage, and declares that her husband is bound to maintain any children which she

(a) The 57th section enacts, "that every man who, from and after the passing of this act, shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, at the cost price

thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly."

may have at the time of marriage, whether they are legitimate or illegitimate. His duty to maintain them ceases on their attaining the age of sixteen, or on the death of their mother. It is absurd therefore to say the 71st section is to apply so as to give his settlement to the children, if illegitimate, the effect of which will be, to make them a permanent burden on his parish after his liability to maintain them has ceased, on their attaining the age of sixteen, or the death of their mother. The 57th section was construed in *Rex v. Walthamstow* (a), where it was held that, on the marriage of a widow having children under sixteen, they do not acquire the settlement of the second husband. It is true that in that case the children were legitimate. But why should there be any distinction in this respect between legitimate and illegitimate children. Now that the birth settlement of illegitimate children is taken away, it is probable that it was intended to adopt the analogy of the old law, according to which, the legitimate children of a widow who married again did not acquire the settlement of the second husband: *Wangford* and *Brandon* (b), *Rex v. St. Giles in the Fields* (c), *Cumner* and *Milton* (d). In *Reg. v. Wendron* (e) it was decided that a bastard, born before the passing of the 4 & 5 Will. 4, c. 76, did not, on the marriage of its mother, acquire her husband's settlement (f).

Thesiger contra. The words of the 71st section are clear, whatever may be the intention; and it is better to defeat the intention than to put a construction not warranted by the words of the act: *Rex v. Barhan* (g). It might lead to inconvenience, if these children should not take the husband's settlement; for, if the husband were to die before

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(a) 6 A. & E. 301; S. C. 1 N. & P. 460.

(b) Carth. 449.

(c) Bur. S. C. 2.

(d) 2 Salk. 528.

(e) 3 N. & P. 62.

(f) They referred also to Mr. Archbold's opinion, as expressed in vol. iii. p. 261 (2d ed.) of his Justice of the Peace, and to *Lang v. Spicer*, 1 M. & W. 129.

(g) 8 B. & C. 104.

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their attaining the age of sixteen, then their mother will have one place of settlement and they another. (He was stopped.)

Bodkin on the same side was not heard.

Lord DENMAN C. J.—We are quite satisfied. The words of the section are perfectly clear, and cannot have the meaning which has been contended for.

PATTESON and WILLIAMS Js. concurred.

D. Order of Sessions quashed.

The QUEEN v. The Inhabitants of WYMONDHAM (a).

The examination of a pauper set up a yearly hiring, which was alleged to have taken place while the pauper was "single and unmarried."

Held, that it was consistent with this allegation that the pauper was, at the time of the hiring, a widower with children, and therefore that the examination did not shew, as it ought to have done, that the pauper was within the description, given by 3 & 4 W. 4, c. 11, s. 7, of a person capable of acquiring settlement by hiring and service.

ON appeal to the Norfolk Quarter Sessions for Michaelmas, 1842, against an order for the removal of *James Girdlestone*, his wife and four children, from the parish of Barford to the parish of Wymondham, both in the said county, the order was confirmed, subject to a case for the opinion of this Court.

The case set out the examination of the pauper, which alleged that he was hired for a year in the appellant parish in 1820, "whilst he was single and unmarried," and, after stating the service under it, proceeded to state that "he was married to his present wife about the year 1830, and had by her the four children named in the order of removal."

One of the grounds of appeal was that the examination of the pauper was defective and bad upon the face of it, in not stating that at the time of the hiring he had not any child or children.

(a) Decided in Easter term, 1843, (May 3).

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The only question argued before this Court was, whether it sufficiently appeared from the examination that the pauper at the time of the hiring above mentioned was not a widower having children.

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Biggs Andrews in support of the order of sessions. The words "single and unmarried," in their ordinary sense, mean a person who never has been married, and the word "unmarried," of itself, has been so interpreted: *Maberley v. Strode* (a). "Single woman," in an indictment, means a woman who has never been married.

Kelly and Palmer contra. "Single woman" is a mere translation of "feme sole," which the courts of equity construe to mean a widow as well as a spinster. The statute 3 W. & M. c. 11, s. 7, in describing the person who may acquire a settlement by hiring and service, uses the words "any unmarried person not having child or children." The latter part of this description would be redundant, if the word "unmarried" excludes a widower or widow with children. In *Johnson's Dictionary*, "unmarried" is defined "having no husband or no wife." But it is sufficient to say that the words used in this examination are equivocal, and that this Court has repeatedly declined to draw inferences in construing instruments of this kind, when the fact in question might itself be so easily stated.

Lord DENMAN C. J.—The description of the party whom the statute enables to acquire a settlement by hiring and service is an "unmarried person not having child or children." In some cases different words are so precisely equivalent that one word will do as well as the other; but that is not the case here. The words referred to in this statute are not words of proviso, so that it would properly be cast upon those who disputed the settlement to say, by way of answer, that the pauper at the time of hiring was

(a) 3 Vcs. 450.

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married or had children, and that he was therefore disqualified, but they are words descriptive of the person who alone is qualified to gain a settlement by hiring and service. It was for the respondents therefore to bring the pauper within the description in the statute. But the examination leaves it open to doubt, at least, whether the pauper was not a widower with children. The examination is bad.

PATTESON and WILLIAMS Js. concurred,

D.

Order of Sessions quashed.

The QUEEN v. The Inhabitants of HOLBECK (a).

Pauper, by written agreement, hired for four years as a servant in turning iron work, or any other employment as an artisan which his master might set him to, and promised to devote his whole time to such business during the usual working hours, from 6 A. M. to 6 P. M., and also to give a just account of all his doings in such business, whenever his master should require him, in consideration of weekly wages to be paid to him by his master; and his master, in consideration of such work, promised to pay him at and after the rate of 8s. a week.

Held, an exceptive hiring.

ON appeal to the Leeds borough sessions, against an order for the removal of *Thomas Brayshaw*, &c. from the said township of Holbeck, in the county of York, to the township of South Crossland, in the same county, the order was quashed, subject to a case.

The case stated that the only ground of appeal set up by the appellants in their notice was as follows: "that so much of the examination of the said *T. Brayshaw*, the pauper, accompanying the order of removal as states that he never did any act to gain a settlement in his own right is untrue, for that the pauper has in fact gained a settlement in his own right in Holbeck, by hiring and service, in manner following; that is to say, that by a certain memorandum or agreement in writing, bearing date on or about the 31st day of May, 1824, and made between *James Fenton* and

(a) Decided in Easter Term, 1843 (May 3).

Matthew Murray, of Holbeck, steam engine makers and iron foundry, of the one part, and the said *T. Brayshaw* of the other, the said *T. B.* agreed to work for and serve diligently and faithfully the said *J. Fenton* and *M. Murray*, their executors and administrators, from the day of the date thereof, for the term of four years thence next ensuing, as their hired servant, in turning iron work, or any other employment as an artisan they might set him to, and did promise to devote his whole time and attention to such business during the usual working hours, which were from six in the morning until six in the evening, when in the shop, and from six to six when working out; and also that he would direct and assist such men as he might work with or were under his care; and also that he would give a just account of all his doings in such business whenever they should require him; and further, that he would not hold any communication with, or make known or shew their plans or principles of working to any person in the trade, in consideration of weekly wages to be paid to him by the said *J. Fenton* and *M. Murray*, their executors or administrators; and the said *J. Fenton* and *M. Murray*, in consideration of the work and service aforesaid, did thereby promise and agree to pay, or cause to be paid, to *T. Brayshaw*, at and after the rate of 8s. weekly during the first year, 9s. weekly during the second year, 10s. weekly during the third year, and 11s. weekly during the fourth and last year of the said term of four years, in case the said *T. B.* should during the said term faithfully serve the said *J. F.* and *M. M.* according to the true intent and meaning of the said agreement, but not otherwise.

“And by virtue and in pursuance of the above recited agreement, the said *T. B.* on or about the said 31st of May, 1824, he being then an unmarried person, not having child or children, did lawfully hire into Holbeck with *J. F.* and *M. M.* as such servant, and did devote his whole time to their business and service, and was paid for all over hours he worked for them beyond the hours expressly sti-

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pulated for in the said agreement, and did continue and abide in the same service during the space of one whole year at least, to wit, for the space of four years or thereabouts, and did during the whole of such service sleep and reside in Holbeck, by which hiring and service the pauper did acquire and possess a legal settlement in Holbeck."

"The respondents objected to any evidence being given in support of the above mentioned ground of appeal, on the ground that the hiring stated therein was, upon the face of the agreement set forth, an exceptive hiring, and therefore not such a hiring as (with a service and residence under it) would confer a settlement. The Court overruled the objection and heard the evidence.

"The agreement, bearing date the 31st May, 1824, was then put in, and the performance of service under it was proved. About eighteen or twenty years ago the usual hours of working in the trade carried on by Messrs. *Fenton* and *Murray* (in the ground of appeal mentioned), were from six in the morning to seven at night: they were then altered, in consequence of a turn-out among the workmen, and have since continued to be from six in the morning till six at night. Messrs. *Fenton* and *Murray* exercised no controul over their workmen out of those hours, except as hereinafter mentioned. Sometimes the workmen worked under hours, and were paid at the usual rate of their wages, with a proportionate deduction for short time. When trade was brisk they sometimes worked over hours, at the request of their masters, and were then paid for such over time at the usual rate of their wages, without any express fresh contract being made. The workmen were generally glad to do so, though they sometimes refused, and the masters submitted to such refusal. No instance of any workman refusing to work during over hours, when requested so to work, was proved to have taken place during the four years of the pauper's service under the said agreement. The witness knew of no such instance. Some of the workmen, after their day's work at Messrs. *F.* and *M.*'s foundry, did,

during extra hours, work in the same trade for other masters. The pauper himself sometimes worked over hours, when requested on behalf of his masters so to do, and was in such case paid additional wages. He never refused to work over hours when requested. He had been in the service of *F.* and *M.* for two years immediately before he entered into the said agreement.

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“If the Court of Queen’s Bench shall be of opinion that the appellants are entitled to go into evidence, in support of their ground of appeal above mentioned, and that the hiring as set forth therein was such as (with a service and evidence under it) would confer a settlement, the order of sessions shall stand confirmed; but if the Court shall be of a contrary opinion, then the order of removal aforesaid shall be confirmed, and the order of sessions discharging the same shall be quashed.”

Kelly, Hall and *Pashley* in support of the order of sessions. The hiring in this case was not an exceptive hiring. There is, first, an absolute agreement to serve for four years, and the subsequent clause, by which it is stipulated that the pauper shall devote his *whole* time to the business during the usual working hours from six A. M. until six P. M. was inserted for the purpose of stating the mode in which the service is to be performed. It has indeed the effect of extending, rather than contracting, the duration of the daily labour, for it excludes the usual intermission of meal hours. *Rex v. Ossett-cum-Gawthorpe* (a) is directly in point: there the hiring was for five years at certain weekly wages, “the hours of working to be from six in the morning until seven o’clock in the evening, and to be paid for all over time.” The only distinction is, that in that case the mention of the working hours was introduced after the mention of wages, and here it occurs immediately after the limitation of the term of hiring. But it is immaterial in what part of the contract the state-

(a) 4 B. & Ad. 216; S. C. 1 N. & M. 21.

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ment of working hours is placed. In *Rex v. Byker* (a) the workmen were hired for a year, to be paid "for every good and sufficient day's work, not exceeding fourteen hours (and 2d. per day when that time was exceeded) 1s. 10d." There it was observed by *Bayley J.* in delivering the judgment of the Court, that "time was only mentioned as the measure of wages; that the contract does not impose any limit upon what might reasonably be required by the master; and that the relation of master and servant continued during the whole twenty-four hours." So in the present case it is clear that the usual working hours are mentioned merely as a measure of wages, for the wages were not to be absolute weekly wages, but to be variable "at and after the rate" of so much a week; the mention of the usual working hours would enable the parties to compute the proper deduction to be made for a short day's work. The pauper clearly could not work for any other master, for he expressly bound himself not to do so, and also to give an account of his doings in business whenever his master should require him: the relation of master and servant therefore subsisted throughout the day. *Rex v. St. John, Devizes* (b), where the pauper was told, at the time of hiring, that she must work twelve hours a day, is also an authority in favour of the appellants. In *Rex v. Cowpen* (c) there was an exception of every alternate Saturday: in *Rex v. Norton Bavant* (d) of the half of every Saturday. In *Rex v. Frome Selwood* (e) the bargain was for a certain number of hours, without reference to custom, and the wages were an absolute weekly sum, so that time could not have been introduced as a measure of wages. The same observation applies to *Rex v. Kingswinford* (f), where also Sundays were excepted. Here Sunday is not excepted; so that the agreement is imperfectly expressed,

(a) 2 B. & C. 114, S. C. 3 D. & M. 559.
 & R. 330.

(b) 9 B. & C. 896; S. C. 4 M. & R. 681.

(c) 5 A. & E. 333; S. C. 6 N.

(d) 3 A. & E. 161; S. C. 4 N.

& M. 687.

(e) 1 B. & Ad. 307.

(f) 4 T. R. 219.

if it were really intended to except all other hours than those mentioned as the usual working hours.

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Sir *W. W. Follett* S. G., Sir *G. Lewin*, and *J. Ingham* *contra* were not heard.

LORD DENMAN C. J.—The question must be considered with reference to the contract itself. The contract itself limits the duration of the daily service. The pauper could not be called upon to serve beyond the hours mentioned.

PATTESON J.—I do not see how the words of the agreement as to the number of working hours can be separated as suggested, for they are necessarily connected with the words immediately preceding, by which the contract of service is made for four years. I think this neither more nor less than a limited contract to work from six in the morning until six in the evening.

WILLIAMS J.—The question is, whether there has been a contract for a year; if there has not, it matters not what the actual service has been. It appears to me impossible to say that there was in the outset an unqualified undertaking to serve the whole day, and that what followed as to the working hours was merely a statement of fact with respect to the usual working hours. The stipulations to be fulfilled by the servant follow each other consecutively; first of all there is the undertaking to serve for four years, the servant to devote his whole time to the master's service, not during the four years, but during "the usual working hours;" then the working hours are defined; and it is not until after these stipulations have been disposed of, that the stipulations to be fulfilled on the part of the master are introduced. I do not see how we can strip the clause as to working hours from the earlier part of the agreement limiting the term of the hiring.

D.

Order of Sessions quashed.

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The QUEEN v. The Inhabitants of PRESTON (a).

In 1828, when the 42 Geo 3, c. 73, was the statute in force for the limitation of factory labour, pauper was hired in a factory. There was no express contract of hiring, but the pauper was engaged with reference to certain rules, by one of which the hours of attendance for each person engaged in the factory were stated to be from six A. M. to half-past seven P. M., excepting Saturday, when work was to cease at half-past four, half an hour allowed for breakfast, and one hour for dinner, and any person not coming to work at the stated periods for every offence to forfeit 6d., and be deducted for the time he should be absent.

Held, an expressive hiring.

ON appeal to the Lancashire Quarter Sessions against an order for the removal of *Alice Waring*, &c. from the township of Preston, in the said county, to the township of Inskip-with-Sowerby, in the said county, the order was quashed, subject to the opinion of this Court upon the following case :—

It was admitted that the birth settlement of *Alice Waring* was in the appellant township of Inskip-with-Sowerby.

The appellants then proceeded to give evidence of a settlement gained by the pauper in the respondent township by hiring and service with Messrs. *Thomas Ainsworth and Sons* in the respondent township; and it was proved that the pauper was hired by Messrs. *Thomas Ainsworth and Sons* in the year 1828, and worked under such hiring for more than one year at weekly wages, residing all that time in the said township, that there was no express contract of hiring, but that she, with the other people engaged in the mill, worked under and was subject to certain rules, two of which rules were as follows, that is to say :—

1st. Each person employed in this factory engages to serve *Thomas Ainsworth and Sons*, and to give one month's notice in writing previous to leaving his or her employment, such notice to be given in on a Saturday and on no other day, but the masters have full power to discharge any person employed therein without any previous notice whatsoever.

" 2nd. The hours of attendance are from six o'clock in the morning until half-past seven at night, excepting Saturday, when work shall cease at half-past four, half an hour allowed for breakfast and one hour for dinner, and any person not coming to work at the stated periods shall

(a) Decided in Easter term, 1843, (May 3.)

for every offence forfeit sixpence, and be deducted for the time they are absent."

Upon this evidence the respondents contended—

"1st. That the master having power to discharge his work people at any moment there was no evidence of any general hiring; and

"2nd. That by the provisions of the second rule restricting the hours of labour, and more especially as to the hours of working on Saturdays, the hiring must be considered an exceptive hiring, therefore that no settlement was gained by such hiring and service."

If the Court should be of opinion that the said hiring was a general hiring, the said order of removal was to be set aside, and the order of sessions confirmed; but, if such hiring were exceptive, then the order of removal was to be confirmed, and order of sessions quashed. The Court overruled these objections, and quashed the order of removal, subject to this case.

Whigham in support of the order of sessions. Since the decision of *Reg. v. Holbeck (a)* it is perhaps not open to the appellants to contend, on the authority of *Rex v. Ossett-cum-Gawthorpe (b)*, that this would not be an exceptive hiring, if it were an ordinary contract. But this is a peculiar contract, made with reference to the statutory limitation of labour in factories. The 42 Geo. 3, c. 73, was the statute in force at the time of this hiring, and the exception in the contract is no more than such as the law would have compelled without any express exception. The case, therefore, is like the cases of hiring for a year, with a stipulation for absence in case of being called on to serve in the militia (c). The exception may be considered as no more than an implied exception. In *Rex v. St. John, Devizes (d)*, the pauper was to work twelve hours a day in a factory;

(a) See the preceding case.


(c) See *Rex v. Over*, 1 East, 601.

(b) 4 B. & Ad. 216; S. C. 1 N. & M. 21.

(d) 9 B. & C. 896; S. C. 4 M. & R. 680.

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but it was held, notwithstanding, that this was not an exception in the contract of hiring.

Cowling contrà was not heard.

LORD DENMAN C. J.—I have no doubt that this was an exceptive hiring. It may be that the statutes limiting the hours of factory labour have rendered it impossible in some cases that there should be a settlement gained by hiring and service. But, however that may be, in the present case, where the rules, limiting the labour of the servant to certain hours only of the day are embodied in the contract, the hiring is clearly exceptive.

PATTESON J.—I thought at first this case might fall within *Rex v. Horwick* (a), and other cases where there has been an exception implied from usage, and a settlement has been gained nevertheless. But I think now that the introduction of these rules into the contract constituted an express exception, and that this was an exceptive hiring.

WILLIAMS J. concurred.

Order of Sessions quashed (b).

D.

(a) 10 East, 489.

(b) See the preceding case.

The QUEEN v. The Recorder of PONTEFRAC^T (a).

An examination stated that the pauper's father gained a settlement by

renting three tenements, at, &c. of three different landlords, and gave the names of two of the landlords, but not of the third.

The sessions held the examination bad for omitting the name of the third landlord.

This Court refused to interfere by mandamus to the sessions to hear the appeal.

The examination also alleged that the pauper gained a settlement in his own right by occupying two tenements, the one "at the yearly rent of 9*l*," and the other "at the yearly rent of 1*l*. 11*s*. 6*d*."

Held, that the examination did not shew that the pauper had *rented* the tenements for a year at the said rents, and occupied them under such yearly hiring, within 5 *Geo.* 4, c. 57, s. 2.

PASHLEY on a former day in this term obtained a rule, calling upon the recorder of Pontefract to shew cause why

(a) Decided in Easter Term, 1843 (May 8).

a mandamus should not issue, commanding him to enter continuances, and hear an appeal against an order for the removal of *W. B. Clapham* and his wife from the township of Pontefract, in the borough of Pontefract, in Yorkshire, to the township of Leathley, in the same county.

The affidavits, upon which the rule was obtained, stated, that the order in question was made on the 24th September, 1842, and set out the examination on which the order was made, and the grounds of the appeal which had been entered against it.

The examination stated that the pauper's father, *J. Clapham*, late of Leathley, in the county of York, blacksmith, deceased, was duly settled at Leathley aforesaid, which settlement he gained in the year 1813 or 1814 by renting of *Walter Fawkes*, Esq. a blacksmith's shop at Leathley aforesaid, at the yearly rent of 1*l.* 11*s.* 6*d.*; a cottage also, situate at Leathley, of Mr. *William Milnthorpe*, then of Leathley aforesaid, farmer, since deceased, at the yearly rent of 2*l.* 15*s.*, and also a close of land situated in Lindley, in the said county, at the yearly rent of six guineas; that his father was tenant of the above-mentioned premises for one whole year in 1813 or 1814, or thereabouts; that during the whole of the above-mentioned period his said father resided and slept in Leathley aforesaid, in the cottage taken by him of the said Mr. *Milnthorpe*. And this deponent further saith, that he also gained a settlement in the parish of Leathley aforesaid in his own right, which he gained in the following manner, namely, in or about the year 1828 he occupied a cottage and close of land belonging to the Rev. *Richard Ridley*, situate at Leathley aforesaid, at the yearly rent of 9*l.*, and the above-mentioned blacksmith's shop at the yearly rent of 1*l.* 11*s.* 6*d.*, all which said premises he occupied for three years, paid the several rents as they became due, and resided and slept the whole of the time in Leathley aforesaid in the above-mentioned cottage. Deponent also, in the year 1828, rented of *Joseph Parson*

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the eatage of the burial ground for one year at the rent of 12s., which rent he also paid.

The grounds of appeal were as follows:—

4th. That the said examinations are defective and insufficient, inasmuch as they do not disclose or furnish us with the *name* of the person or persons of whom the said *J. Clapham* rented the said close of land in the examination of the said *W. B. Clapham* described to be situate in Lindley.

11th. That with respect to the settlement alleged to be gained by the said *W. B. Clapham* in his examination, the said examination is defective and insufficient, inasmuch as it is not therein stated, nor does it anywhere appear, that the said *W. B. Clapham* rented or occupied the cottage, close of land and blacksmith's shop therein mentioned to have been occupied by him, or any of them, *under a yearly hiring*.

12th. That the said examination is bad, because it does not appear upon the face thereof that the said *W. B. Clapham* ever bonâ fide rented a separate and distinct dwelling-house or building, or of land, or of both, in our township, at and for the sum of 10*l.* a year, at the least, for the term of one whole year, and because it does not appear that he occupied any such house or building or land uuder such yearly hiring, and actually paid the rent for the same, to the amount of 10*l.* at the least, for the term of one whole year.

The Court held the objections to be fatal to the order, and refused further to proceed and hear the evidence with respect to the alleged settlement, and quashed the order, but offered to grant a case for the opinion of this Court.

The affidavits stated also that the township of Lindley was a small township, containing only about twenty-five families, and that it adjoined upon the township of Leathley; and that the close was situate about one mile of the cottage so occupied by the pauper's father.

Pashley on moving contended that, if the decision of the Recorder was wrong, this Court would have no difficulty in interfering by mandamus. The Court did so in *Reg. v. The Justices of the West Riding* (between *Keighley* and *Wilsden*(a)). There the examinations shewed that a sister of the pauper's late husband, when unmarried and pregnant, had been permitted to come to the appellant township to lie in, at a time when she had gained no settlement for herself; and that neither the pauper nor her late husband had gained any settlement: it was argued that the acknowledgment of the sister-in-law's settlement was some evidence of the pauper's. The Court, in making the rule absolute for the mandamus, was of opinion that there was some evidence of the pauper's settlement. It is clear that the sessions refused to hear this case, and that the objections were preliminary objections to the hearing. In the case of *Reg. v. Justices of Carnarvonshire*(b) the Court interfered by mandamus, to compel a hearing by the sessions, where the grounds of appeal were wrongly held to be insufficient by the sessions.

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Hall and *Pickering* now shewed cause, and contended that, after the decisions of *Reg. v. St. Margaret's, Rochester*(c), and *Reg. v. Wymondham*(d), the Court would not hold that this examination entitled the respondents to go into evidence either of the settlement of the pauper's father or of the pauper himself. As to the first, *Reg. v. The Justices of Sussex*(e) is almost identical; there the objection, that the landlord's name was not given, was held fatal. This is a question whether there is sufficient particularity; the sessions have held the statement to be insufficient, and they are the proper judges of this matter: *Reg. v. Bridgewater*(f).

(a) Hil. T. 1842, not reported.

(b) 1 G. & D. 423.

(c) *Ante*, 669.

(d) *Ante*, 690.

(e) 10 A. & E. 682; S. C. 3 P. & D. 42.

(f) 10 A. & E. 698; S. C. 1 G. & D. 268.

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2. The settlement alleged to have been gained by the renting of the pauper himself is insufficiently stated, inasmuch as it does not appear that he rented the tenement for a year, in the words of the 6 *Geo.* 4, c. 57. He is indeed alleged to have "occupied" for that time at a yearly rent, but, if words are relied on as equivalent to a statutory description, they must be such as will embrace every possible state of facts. *Reg. v. Middleton in Teesdale*(a) is directly in point. Here, the pauper might have occupied for many years as a tenant at will, on an understanding that he was to pay after the rate of a certain annual sum for such occupation until the will should be determined; by this he would not gain a settlement. The examination is also consistent with such a state of circumstances as appeared in *Rex v. Banbury*(b), where the occupation at one part of the year was under one yearly hiring, and during the other part under another yearly hiring, and it was held that the two occupations could not be joined, as the statute 1 *Will.* 4, c. 18, which was there in question, requires, in the same terms with the 6 *Geo.* 4, that the occupation shall be under *such* yearly hiring. [*Patteson J.* referred to *Rex v. Herstmonceaux*(c).] In that case the sessions found that there was a distinct taking for a year in the first instance; as also in *Rex v. Wainfleet, All Saints*(d). If it be said that the examination contains evidence from which the justices might find a renting for a year, the same observation would have applied to almost all the examinations which have been recently held bad. The justices may remove on the slightest ground of removal, if it be distinctly alleged, but here there is no distinct allegation of any ground of removal. No doubt the examinations contain some *evidence* of a yearly renting, but that is not equivalent to a distinct averment. In cases of settlement by hiring and service, it would not

(a) 10 A. & E. 688; S. C. 3 P. & D. 473.

(b) 1 A. & E. 136; S. C. 3 N. & M. 292.

(c) 7 B. & C. 551; S. C. 1 M. & R. 426.

(d) 8 B. & C. 227; S. C. 2 M. & R. 223.

be sufficient to state service in an examination, and to leave the hiring for a year to inference, both must be stated: *Reg. v. North Bovey* (a). They cited also *Reg. v. Stoneleigh* (b).

Unless the sessions are clearly wrong, this Court will not interfere.

Pashley contra. This Court will equally interfere if the sessions have been wrong, whether the point be clear or difficult. It is as if this preliminary objection, held fatal by the sessions, and now under consideration, had been stated in a special case. In this instance a case was offered by the sessions but declined, on account of the present course being cheaper and speedier.

As to the first objection, the correct rule is laid down in *Rex v. Justices of Derbyshire* (c), that reasonable information must be given for the purposes of further inquiry into the truth of the alleged settlement; and it must be remembered that the 4 & 5 Will. 4, c. 76, s. 80, gives the appellants free access to the pauper, "for the purpose of examining him touching his settlement." But whatever the value of the objection might be, if made on the hearing of the appeal, it cannot prevail as a preliminary objection. It is impossible to say, on inspecting the examination, that the information respecting this close is not sufficiently definite. In fact Lindley is a small hamlet, a subdivision of Leathley, and the close in question was only a mile distant from the cottage in which the pauper's father resided.

With respect to the sufficiency of the statement as to the yearly renting, the cases only shew that there must on the face of examinations be *some* evidence to justify each conclusion drawn in the order of removal; that there must be some evidence of chargeability and of residence in the removing parish, and some evidence of settlement in the

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(a) 1 G. & D. 701.

(b) 2 G. & D. 535.

(c) 6 A. & E. 885; S. C. 1 N. & P. 703.

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parish to which the removal is directed. In *Reg. v. Black Callerton*(a) the examinations were bad for containing no evidence of chargeability. In *Reg. v. Ecclesall Bierlow*(b) the examinations contained no legal evidence of settlement, but were entirely hearsay. *Reg. v. Rishworth*(c) was a case where there was a want of all evidence of settlement. So in *Reg. v. Mildenhall*(d) the examination was held bad as containing no legal evidence whatever of the former order of removal, which was alone relied on as shewing a settlement. In *Reg. v. West Riding Justices (Drighlington against Pudsey)*(e) the Court held that a ground of appeal ought distinctly to allege the forty days residence necessary to gain a settlement; and so in *Reg. v. Flockton*(f) a total want of evidence of such residence was held fatal. The case of *Reg. v. Wymondham*(g) is equally consistent with all the cases that preceded it and with the sufficiency of this examination: a particular class of persons was defined by statutory enactment, and they alone were rendered capable of acquiring a particular settlement, and the Court held persons claiming to that settlement must shew that they belong to that class. The principle on which *Reg. v. Wymondham* was decided is the same as is laid down in *Stowell v. Lord Zouch*(h): it is there said, "The purview does not warrant any feoffment but of such persons as are void of the specified defects." So the statute of *William & Mary* does not confer settlement by hiring and service, except on such persons as are unmarried and without child or children. The test, suggested on the other side, of an examination disclosing a settlement by hiring and service, may be adopted. Surely the hiring need not be expressly averred, although it is in fact essential to the acquisition of the settle-

(a) 10 A. & E. 679; S. C. 2 P. & D. 475.

(b) 1 G. & D. 160.

(c) 1 G. & D. 597.

(d) 2 G. & D. 86.

(e) 1 G. & D. 706.

(f) *Ante*, 664.

(g) *Ante*, 690.

(h) Plowden, 376.

ment. Suppose a pauper's father to have hired and served for a year forty years ago, and again to have done so in each successive year for twenty years; if the master and servant be both dead, and no one was present at any hiring, evidence of twenty years' successive service would be insufficient, according to the argument for the appellants, to justify the making of the order, although abundantly enough, as is decided by many cases (a), to establish the settlement on the hearing of the appeal. In *Reg. v. North Bovey* (b) the question arose on grounds of appeal. Why should a pauper be required to swear in his examination to an inference from facts which enable any one else equally to draw that inference? It is submitted that of the weight of evidence the magistrates who made the order were the sole judges: per Lord Kenyon C.J., in *Rex v. Smith* (c). (On this point he also referred to *Rex v. Reason* (d) as cited in *Reg. v. Bolton* (e)). Here rent is stated to have been paid eo nomine, and such an acceptance of rent is an admission of a tenancy. "Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of rent (f)." In *Doe d. Martin v. Watts* (g), it was said by Grose J. "The plaintiff received rent of the defendant; and from that moment he admitted that the defendant was a tenant to him of some kind—and no other tenancy appearing, the defendant must be considered as tenant from year to year." *Reg. v. Justices of Buckinghamshire* (h) is also a strong authority on this point.

Lord DENMAN C. J.—The first defect pointed out in the examination is, that it does not disclose the name of the landlord of whom the pauper's father rented a close of

(a) See *Reg. v. Long Whatton*, 5 T. R. 447; *Reg. v. Pendleton*, 15 East, 449.

(b) 1 G. & D. 701.

(c) 8 T. R. 588.

(d) 6 T. R. 375.

(e) 1 Q. B. 69; S. C. 4 P. & D. 679.

(f) Rosc. Ev. 434, 5th ed.

(g) 7 T. R. 83.

(h) 2 G. & D. 560.

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land. It appears to me that the sessions have decided on this point against the validity of the examination, and they have been invited in *Reg. v. Bridgewater(a)* to take upon themselves to decide whether descriptions of this kind are or are not sufficiently particular. The particularity may or may not be sufficient in our opinion, but we do not feel called upon to disturb their decision.

As to the settlement alleged to have been acquired by the pauper himself, the defect pointed out is, that it does not follow the words of the 6 *Geo. 4*, c. 57, in averring that he "rented" the tenement for a year, nor use any strictly equivalent expression. The counsel for the appellants have put a case, in which the language "occupied for a year paying a yearly rent" would be supported in evidence without satisfying the 6 *Geo. 4*, c. 57, for the pauper might have continued to hold for a year without any yearly hiring, and the rent paid by him might have been called a yearly rent.

PATTESON J.—The objection to the father's settlement is quite sufficient, the landlord's name not being specified.

As to the other objection, the words of the stat. 6 *Geo. 4*, c. 57, appear at first sight a little ambiguous. The tenement is to consist of "a building or building and land bonâ fide rented at and for the sum of 10*l.* a year at the least for the term of one whole year." These words might, but for what follows, be construed only to require an occupation for a year as tenant, and not a contract for a year also. But the statute proceeds to enact that the house must be occupied for a year "under *such* yearly hiring," words which plainly shew that a taking for a year is contemplated. There is no allegation here of such a taking for a year. Consistently with the language of this examination there may have been nothing more than a tenancy at will.

(a) 10 A. & E. 693; S. C. 1 G. & D. 268.

WILLIAMS J.—The first objection is clearly good, and we cannot enter into a discussion respecting the size of a township, or lay down the law differently for townships of different sizes.

I agree also that the renting contemplated by the statute must be a taking for a year, and that there is here no sufficient allegation of that material fact.

WIGHTMAN J. concurred.

D.

Rule discharged.

The QUEEN v. PARKER and others.

Thursday,
May 26th.

INDICTMENT. The first count stated that the defendants "being evil-disposed persons, and contriving and intending to cheat and defraud divers of the liege subjects of our Lady the Queen of *their* goods and merchandizes, on &c." "unlawfully, wickedly, and fraudulently did conspire, combine, confederate and agree together among themselves with divers other persons to the jurors unknown, by divers false pretences and subtle means and devices to obtain and acquire of and from divers liege subjects of our Lady the Queen, then carrying on business in the said city, to wit, of *Thomas Tarn* and *David Law*, of Addle Street, in the said city, warehousemen and copartners, and of *Edmund Fennell* and *Richard Fennell*, of Aldermanbury Postern, in the said city, cotton yarn manufacturers and copartners, and of *John Holmes*, of King Street, Cheapside, in the said city, lace manufacturer, and of *John Bradbury* and *Jeremiah Greatorex*, of Aldermanbury, in the said city, general warehousemen and copartners, divers goods and merchandize of great value, to wit, of the value of 10,000*l.*, and to cheat and defraud the said liege subjects of the said goods and merchandize." The indictment then stated and negatived the pretences. The first count concluded, and so the jurors aforesaid upon, &c. say, "that the said

An indictment for a conspiracy to obtain goods by false pretences did not state whose property the goods were, which it was the object of the conspiracy to obtain.

Held bad in arrest of judgment.

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(defendants) in manner and by means aforesaid, and in pursuance of the said unlawful, wicked and fraudulent conspiracy, unlawfully and fraudulently did obtain from the said *Thomas Turn* and *David Law*, *Edmund Fennell* and *Richard Fennell*, *John Holmes* and *John Bradbury*, and *Jeremiah Greator* respectively, the goods and merchandize aforesaid, and did cheat and defraud them thereof."

The second count charged a conspiracy "by divers false pretences and subtle means to obtain and acquire of divers liege subjects of our Lady the Queen then carrying on business in the said city, to wit," (naming the parties as above,) "divers goods and merchandize of great value, to wit, of the value of ten thousand pounds, and to cheat and defraud the said liege subjects of the said goods and chattels."

The third count charged a conspiracy to represent, and cause to be believed, one of the defendants to be a man of property, "and by means of the said belief to obtain and acquire of and from divers liege subjects of our Lady the Queen then carrying on business in the said city divers goods and merchandize of great value, to wit, of the value of 10,000*l.*, and to cheat and defraud the said liege subjects of the said goods and merchandize."

The fourth count charged a conspiracy "by divers false pretences and subtle means and devices to obtain and acquire of and from divers liege subjects of our Lady the Queen divers other goods and merchandize."

On the defendants being brought up for judgment,

Humfrey obtained a rule to shew cause why the judgment should not be arrested, on the ground that in no count of the indictment was it stated whose property the goods were which the defendants were charged with conspiring to obtain.

Platt and *Swann* shewed cause. It is not necessary to state whose property the goods were, which it was alleged

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to be the object of the conspiracy to obtain by fraud. A charge of conspiracy to obtain goods by false pretences is not like that of actually obtaining the goods by false pretences, which must contain every allegation necessary to constitute the offence of larceny, in order that the judgment upon it may be pleadable in bar to an indictment for larceny: *Reg. v. Norton*(a). [Lord Denman C. J. In *Reg. v. Martin* (b) we thought an indictment for obtaining goods by false pretences, which did not state whose goods had been obtained, bad; because, for anything that appeared, the defendant might only have obtained his own goods.] Putting a fair construction on the language of the indictment, that supposition is excluded. The defendant could "cheat and defraud" a person of goods only on two suppositions; one, that the goods were not his own; the other, that if they were his own, he had conspired to obtain them under such circumstances as would still amount to a cheating and defrauding, similar to those under which it has been held a man may be guilty of stealing his own goods: 1 *Hale*, P. C. 513. In *Rex v. Mackarty* (c), which was an indictment for obtaining goods by false pretences, the property is not stated. [*Patteson* J. There is no conspiring laid in terms in that case, but the property is alleged in the earlier part of the indictment, where the intention of the defendants is charged, "For that they, falsd, &c. intendentes *Thomas Chowne* de London, &c. de bonis et merchandizis suis defraudare," agreed with the aforesaid *T. Chowne* to sell him a certain pretended wine "pro quâdam quantitate galearum, Anglicè hats, ipsius *T. C.*"] In *Stark*. Crim. Pl. 718 (2d ed.), there is a precedent of an indictment for conspiring to charge a man with receiving stolen goods, and thereby obtaining a guinea from him, but there is no allegation of property in the guinea. [Lord Denman C. J. The conspiracy there is falsely to charge, that is clearly the subject

(a) 8 C. & P. 196.

(c) 2 Ld. Raym. 1179.

(b) 8 A. & E. 481; S. C. 3 N. & P. 472.

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of an indictment.] The object of naming the owner of the property defrauded, is to point out the person against whom the offence has been committed; 1 *Hale* P. C. 512; 2 *Hale* P. C. 180. That sufficiently appears here. [*Patterson* J. referred to *Rex* v. — (a)].

The conspiracy was complete before anybody was defrauded. There may be a conspiracy to cheat all mankind. The last count is general for a conspiracy. [*Patterson* J. It does not seem to be distinguishable from the indictment in *Reg. v. Peck* (b) which, it was held, could not be supported.]

The defect, if any, is cured by the verdict. It must be taken that the jury would not have been directed to find, nor would have found, the defendants guilty, unless to "cheat and defraud" in the legal sense of the words had been proved, as alleged, to have been the object of the conspiracy.

Humfrey and *E. James* contra. The general rule is, that the property must be stated. Such language must be used as not to leave it ambiguous whether the object is criminal or not. In *Rex v. Richardson* (c) it was held that an indictment for conspiracy to defraud the prosecutor of the fruits of a verdict was too general and vague. In an indictment for obtaining goods by false pretences the property must be stated, in order, as Lord *Denman* said in *Reg. v. Martin* (d), to exclude the supposition that the defendant obtained his own goods. To the same effect is *Reg. v. Peck* (b). The reason of those decisions applies to an indictment for this offence of conspiracy. In *Reg. v. Wickham* (e) it was held that the circumstances of the offence charged must be so alleged as to shew affirmatively the criminality of them. *Rex v. Gill* (f) is an authority that

(a) 1 Ch. 698.

& P. 472.

(b) 9 A. & E. 686; S. C. 1 P. & D. 508.

(e) 10 A. & E. 34; S. C. 2 P. & D. 333.

(c) 1 M. & Rob. 402.

(f) 2 B. & Ald. 304.

(d) 8 A. & E. 485; S. C. 3 N.

a general statement of the means used may in some cases be sufficient, but it is none that the criminal object must not be distinctly stated. In fact it was in that case shewn of whose money the defendants conspired to cheat and defraud the persons named. *Rex v.* — (a), the case referred to by Mr. Justice *Patteson*, turned on another point, and therefore it is probable the part of the indictment which would relate to the present question was not fully set out.

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LORD DENMAN C. J.—The first count of this indictment charges a conspiracy to cheat and defraud certain persons, who are named, of divers goods and merchandize, but it is quite silent as to the property in the goods which it was the object of the conspiracy to obtain. There is no precedent for holding such a count to be a good description of a criminal act, unless by some language it excludes the supposition that the goods were the property of the defendants, or by appropriate allegations shews that if they were, still under the circumstances the conspiracy to obtain them was a violation of the law. The fourth count is still more general in its terms. In *Rex v. Gill* (b), where the words were very large, they stated whose property the goods were. The argument in support of the validity of this indictment must go to the length that a count generally of a conspiracy to cheat and defraud would be good.

PATTESON J.—The indictment is in all its counts consistent with a conspiracy to obtain back the defendant's own goods. But it is argued on the part of the prosecution that this supposition is excluded by the words "cheat or defraud." If this argument were well founded it would be unnecessary to allege anything.

WILLIAMS J.—In *Rex v. Gill* (b), and, if I am not mistaken, in an older case also, though a very general descrip-

(a) 1 Ch. 698.

(b) 2 B. & Ald. 201.

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tion of the offence was held to be sufficient, it was alleged whose property the goods were which the defendants conspired to obtain.

COLERIDGE J. concurred.

G.

Rule absolute.

The QUEEN v. The Justices of LANCASHIRE (a).

Although the quarter sessions have quashed an order of removal for informality, this Court will not grant a mandamus to them to make a special entry of their grounds for quashing it.

JERVIS obtained a rule (b) calling upon the defendants to shew cause why a mandamus should not issue commanding them to state upon the minutes of the proceedings had before them at the quarter sessions of the peace for that county the grounds upon which they had quashed an order of removal.

The order in question had been appealed against to the Lancashire sessions, and the respondents, being satisfied that their examinations were defective in point of form on the grounds stated in the notice of appeal, applied to the Court to quash their order, and to make a special entry that it was quashed for informality. The Court quashed the order generally, and refused to direct a special entry of their grounds for quashing it.

Jervis, on moving for the rule, relied upon *Beaton v. Southgatebury* (c), where the Court said, "if the order was set aside for want of form you should have moved them to specify that as a reason, and, if they had refused it, we would have compelled them to it," and on the dictum of *Patteson J.* in *Rex v. Wick St. Lawrence* (d), that "it would be much better if the special ground for quashing an order of removal were always stated on the face of the order of sessions, because it would then be unnecessary to give parol evidence on the trial of the second appeal, which

(a) Decided in Easter term,
 1843 (May 11th).

(b) In Michaelmas term, 1842.

(c) Sess. Ca. 4.

(d) 5 B. & Ad. 526; S. C. 2 N
 & M. 289.

is always attended with great expense." He also referred to *Rex v. Wheelock* (a) as an authority against him, where the Court refused a rule for a similar mandamus, on the ground that the judgment of sessions would not be conclusive, but that it might be explained by evidence on the trial of another appeal.

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Cowling now shewed cause. The sessions quashed the order generally, and not on the special ground of informality. But, even assuming that they did, in fact, quash it for informality, this Court will not compel them to *state* the reasons of their judgment. "To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it would be extremely dangerous:" *Reg. v. Justices of the West Riding* (b). He relied on *Rex v. Wheelock* (a).

Jervis contra. The authorities in support of this rule have been very recently recognized in *Reg. v. Brighthelmstone* (c), where it was said "the respondents might also have applied to the sessions to make a special entry that the appeal was disposed of not upon the merits."

LORD DENMAN C. J.—We cannot do what is required. If we were to issue the writ, it might go to a Court composed differently from that which disposed of the order. At all events the sessions must exercise their discretion in such matters.

PATTESON J.—It is clear from *Rex v. Wheelock* (a) that we have not the power to do what is required, and I much regret it.

WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule discharged.

(a) 5 B. & C. 511.

(c) 2 G. & D. 91.

(b) 1 G. & D. 206.

1843.

MARTINS v. UPCHER, Esq. and another (a).

Notice of action against a magistrate, within 24 *Geo.* 2, c. 44, s. 1, or against a policeman, within 10 *Geo.* 4, c. 44, s. 41, must state the place where the cause of action occurred.

A defendant is not, by tendering amends after notice of such action, precluded from objecting that the notice does not state where the cause of action occurred.

TRESPASS and false imprisonment against two magistrates.

Plea: not guilty, and issue thereon.

At the trial before *Alderson B.*, at the Norfolk summer assizes, a question arose upon the sufficiency of the following notice of action, within 24 *Geo.* 2, c. 44:

"To *Henry Ramey Upcher* and *John Johnson Gay*, Esqrs., two of her Majesty's justices of the peace in and for the county of Norfolk.

"I do hereby, as the attorney of and for *Martin Martins*, of North Walsham, in the county of Norfolk, labourer, duly authorised in this behalf according to the form of the statute in such case made and provided, give you notice that the said *Martin Martins* will, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her Majesty's Court of Queen's Bench at Westminster, against you at the suit of him the said *Martin Martins*, and proceed thereupon according to law, for that you, on the 5th day of October, A.D. 1840, with force and arms caused an assault to be made on the said *Martin Martins*, and then caused him to be apprehended, seized and laid hold of, and to be forced and compelled to go as a prisoner and in custody in, through and along divers public highways to a certain dwelling-house, and there caused him to be imprisoned and detained in prison for a long time (to wit), for twelve hours then next following, at the expiration of which time you again forced and compelled the said *Martin Martins* to go as a prisoner and in custody from and out of the said dwelling-house, in, through and along divers other public highways to a prison and house of correction, and to be there imprisoned and kept and

(a) Decided in Trinity Vacation, June 25.

detained in prison there for a long time (to wit), three months then next following, whereby the said *Martin Martins* suffered great pain, &c. &c. and was also put to and necessarily incurred divers great expenses, to wit, to the amount of 50*l.* in and about obtaining his liberation from the said imprisonment, &c. &c.

Yours, &c. *Christopher Robson*, of &c.
Attorney for the said *M. M.*"

" Dated 9th January, 1841."

The defendants before action made a tender of 50*l.* amends, accompanied by a letter reciting the above notice. The letter stated the tender to be " as a compensation and by way of amends to the said *M. M.* for his grievances, wrongs and expenses done to or incurred by him, mentioned and set forth in the said notice, and also for the legal expenses of such notice."

It was objected that this notice was bad, because it contained no statement of the place where the alleged grievance occurred. The learned judge held the objection to be fatal, and the plaintiff was nonsuited.

Peacock, in the following Michaelmas term, moved to set aside the nonsuit and for a new trial. He contended that the tender of amends amounted to a waiver of notice, and cited *Coles v. The Bank of England*(a), to shew that the conduct of the defendants in tendering amends ought to estop them from objecting to the notice, as they had put the plaintiff off his guard, who might otherwise have given a fresh notice.

The Court held that a good notice was a condition precedent to be performed on the part of the plaintiff before action, and that therefore there was no waiver, but granted the rule as to the sufficiency of the notice.

Biggs Andrews now shewed cause. A notice, which does not state where the subject-matter of the complaint has happened, does not " clearly and explicitly contain the

(a) 2 P. & D. 521.

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cause of action" within the meaning of the statute. By the 5th section, a plaintiff is tied down strictly to the matter contained in his notice. Thus where the notice was of an action of trespass for taking goods of the value of 2*l.* in the plaintiff's dwelling-house, it was held that the plaintiff could not recover a larger sum, nor any thing whatever for the trespass in the dwelling-house: *Stringer v. Martyr* (a). But, if no place is stated in the notice, this rule will be evaded, for where nothing is identified it will be impossible to confine the plaintiff at the trial to evidence of any particular transaction. In *Freeman v. Line* (b), a notice of action under a statute against a tollgate keeper, "for demanding and taking of me toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll in and by a certain act of parliament" (describing it), was held bad for uncertainty. He also cited *Bennett v. Broughton* (c), where Lord Abinger C. B. had held a statement of place necessary, and his ruling had not been questioned; and *Larking v. Yorke* (d), before Parke B., at Cambridge, and *Newman v. Bendyshe* (e), before Tindal C. J., also at Cambridge, in both of which the ruling agreed with that in *Bennett v. Broughton* (c).

Peacock contra.—The object of the statute in requiring a notice of action against magistrates to state explicitly the cause of action, was to give them an opportunity of tendering proper amends, and not to throw technical difficulties in the way of a plaintiff. [Lord Denman C. J. Is not place a necessary ingredient in a clear account of any transaction?] The transaction must have been in the county where the magistrate acts, or he would not be entitled to notice, and this notice is addressed to the defendants as magistrates of the county of Norfolk. The place therefore is sufficiently pointed out. If this notice is insuffi-

(a) 6 Esp. 134.

(b) 2 Chit. 673.

(c) Not reported.

(d) Not reported.

(e) Not reported.

cient, to what extent of particularity is a notice to go? Will it be sufficient to state the parish, or must the house and the particular room in the house be described? The object of the notice is merely to give the magistrate substantial information of the ground of complaint. It is not therefore to be construed with great strictness, nor does it require the precision of a declaration; *Jones v. Bird*(a). In *Gimbert v. Coyney*(b), indeed, it was made matter of objection that the notice was as ample as a declaration. In that case the time of the transaction was given quite generally, "on the 16th August, 1824, and on divers other days and times between that day and the day of the date of the notice, which was more than two months afterwards." In *Wood v. Folliott*(c) the notice wanted both time and place, and in *Lovelace v. Curry*(d) it wanted place; yet in neither case was the objection taken. He also cited *Agar v. Morgan*(e), and *Robson v. Spearman*(f).

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LORD DENMAN C. J.—My opinion on the statute 24 Geo. 2, c. 44, which requires that the notice of action shall "clearly and explicitly contain the cause of action," is, that no notice can be clear and explicit unless it contains the place where the grievance complained of has occurred. I do not mean to say that a plaintiff is bound down to give exact time and place; it will be sufficient if he really give a fair account, but they must be notified. It is satisfactory to learn that Lord Abinger has taken the same view, and that his ruling was not questioned. It seems also that my brothers Tindal C. J. and Parke B. have taken the same view. These authorities being quite conformable with our own view, we are bound to say that this notice is bad.

WILLIAMS J.—Without laying it down that there is to

(a) 5 B. & Ald. 844; S. C. 1 D. & R. 497.

(b) 1 M'Clel. & Y. 469.

(c) 3 B. & P. 551, n.

(d) 7 T. R. 631, n.

(e) 2 Price, 126.

(f) 3 B. & Ald. 493.

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be any severe rule of strictness in these matters, or that there is to be that particularity which has been so frequently enforced with respect to indorsements of the name of the attorney issuing a writ, we are bound to say that this notice is bad, as it gives no statement of place.

COLERIDGE J.—I am of the same opinion; the act was passed to protect magistrates in the execution of their office, and ought to receive a liberal construction, so as to advance the object for which it was passed. Mr. *Peacock* seems to assume that the only object of the act was to secure to magistrates an opportunity of tendering amends. But the 5th section enacts, “that no evidence shall be permitted to be given by the plaintiff on the trial of any such action as aforesaid of any cause of action except such as is contained in the notice hereby directed to be given.” And by the 1st section the cause of action is to be stated, “which such party hath or claimeth to have.” The act therefore seems to contemplate the case of a charge against a magistrate being untrue. Suppose then the charge to be false, it would be most material to the magistrate that he should be furnished with a specification of time and place. Even without the three decisions which have been quoted, I should have been clearly of opinion that this notice is bad.

Rule discharged (a).

(a) In *Breese v. Jerdein* and others, argued in Easter term, 1843 (April 27th), before Lord Denman C.J., *Patteson* and *Williams* Js., which was an action against a metropolitan policeman (inter alios), Lord Denman C. J., in delivering the judgment of the Court on a subsequent day in term (May 1st), said, that though the language of the Metropolitan Police Act, the 10 G. 4, c. 44, s. 41, was not precisely the same with the 24 G. 2, “yet that the meaning was substantially the same, and that the same effect must be given to both.” *Bennett v. Broughton* and *Martins v. Upcher* were recognized, and the following notice held bad.

“To *Michael Jerdein*, *William Beaumont* and *James Bradley*. You having on or about the 27th day of May now last past caused *Daniel Breese*, of Pwllheli, in the county of Carmarthen, gentleman, to be ap-

prebended and detained in custody without any reasonable or probable cause whatsoever for the space of three hours then next following, and having afterwards caused him to be unlawfully committed to a certain common gaol or prison called the Compter, in the city of London, and to be there imprisoned, and detained and kept in prison there, without any reasonable or probable cause whatsoever, for a further space of time, to wit, for the space of twelve hours next following; I do therefore, as the attorney of and for the said *Daniel Breeze*, in his behalf hereby give you and each of you notice, according to the form of the statute in such case made and provided, that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be issued out of her Majesty's Court of Queen's Bench against you and each of you at the suit of the said *Daniel Breeze*, for the said apprehension, detention and imprisonment, and shall proceed against you and each of you thereupon according to law.

Yours, *Robert Wynne Williams, of, &c.*
Attorney for the said *Daniel Breeze*."

D.

MORGAN, Bart. v. POWELL.

TRESPASS for breaking and entering the plaintiff's coal mine, and taking and carrying away his coal.

Judgment by default.

On the execution of a writ of inquiry before *Coleridge J.* at the Monmouthshire spring assizes, 1841, the learned judge directed the jury, in accordance with what appeared from a digest to be the rule laid down in *Martin v. Porter*(a), that the proper measure of damages in respect of the coal taken was the value of the coal at the pit's mouth. The jury assessed the damages accordingly at the rate of 5s. 10d. per ton. It appeared that the value of the coal unsevered from the bed was 1s. 10d. per ton.

Sir *J. Campbell A. G.* in the following Easter term obtained a rule nisi for reducing the damages to 1s. 10d. per ton.

Ludlow Serjt. and *R. V. Richards* shewed cause (b).

(a) 5 M. & W. 351.

(b) In Easter term last before

Lord Denman C. J., Patteson, Williams and Coleridge Js.

1842.

MARTINS

v.

UPCHER.

Thursday,
June 9th.

In trespass for severing and carrying away coal from the plaintiff's mine, the proper measure of damages, in respect of the coal taken, is its value as it existed as a chattel, that is, as soon as severed.

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 MORGAN
 v.
 POWELL.

The measure of damages adopted at the trial was right. The plaintiff has a right to put the coal at the value it had when first he had a right to repossess himself of it. The plaintiff could not, without trespassing on the defendant's land, repossess himself of his coal until after it had been brought to the pit's mouth. The rule is expressed thus in 2 *Bl. Com.* 404:—"The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself by such operation was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our *Bracton*, and have since been confirmed by many resolutions of the Courts. It hath even been held that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman." Suppose a tree to be cut down and taken a hundred miles off, cannot the owner retake it without paying the wrongdoer his expenses of felling and carrying it? [Lord *Denman* C. J. Suppose canvas to be turned into a valuable picture?]. There the nature of the thing has been changed. Here—what was done to the coal—the bringing it to the pit's mouth was simply to get possession of it. The coal was not severed from the freehold until it arrived at the pit's mouth.

At all events if the coal became a chattel as soon as severed, still damages cannot be reduced below the measure

authorised by *Martin v. Porter*(a); the plaintiff is entitled to the value which the coal had when it first existed as a chattel, that is, the value of it after it had been severed from its bed, and the defendant is not entitled to deduct the expenses of his own wrongful act in severing it.

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Sir *W. W. Follett* S. G., *Talfourd* Serjt., and *Keating* contrâ. If the owner is entitled to recover for whatever value the coal may acquire by the act of a trespasser, it must be contended that if the coal had been carried to London and had become trebled in value, the owner would be entitled to the price of it in the London market. The proper measure of damages is the value of the coal before the tortious act was committed. Take the converse of this case: if the tortious act depreciates the plaintiff's property, the proper measure of damages is clearly the value of the property before the tortious act. In *Jones v. Gooday*(b) the defendant had cut away part of the plaintiff's land adjoining a ditch. It was contended, "that the plaintiff was entitled to such a sum, by way of damages, as would restore the land to the condition in which it was before the commission of the trespass;" but it was held that the plaintiff was only to be compensated for the damage he had actually sustained, and that the value of the land before the trespass was the proper measure of damages. So in trespass for mesne profits, the measure of damages is the profit which the owner might have made if he had not been dispossessed; but, if the principle contended for by the plaintiff is correct, the trespasser should not be allowed his expenses of cultivation. [*Coleridge* J. There something new is produced.] Suppose timber is made into an expensive article of furniture. [*Coleridge* J. In trover you certainly would have no lien for your labour.] The rule may be different in trover and in detinue. [Lord *Denman* C. J. I cannot see how the

(a) 5 M. & W. 351.

(b) 8 M. & W. 146.

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defendant's wrongful act can entitle him to charge wages against the owner.] Even if *Martin v. Porter* (a) was rightly decided, it makes the value on severance, and not the value at the pit's mouth, the proper measure of damages (b).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court as follows:—The question was, how the value of the coal taken was to be estimated, and the learned judge directed the jury to act on the rule laid down in *Martin v. Porter* (a).

The rule, however, was misstated at the trial, and the calculation has been accordingly taken without making certain allowances, which that rule provides for. The direction of the learned judge in that case was, that the plaintiff was entitled to the value of the coal as a chattel at the time when the *defendant began* to take it away, that is (as there stated) as soon as it existed as a chattel, which value would be the sale price at the pit's mouth, after deducting the expense of carrying the coals from the place in the mine, where they were got, to the pit's mouth; and this direction the Court of Exchequer has affirmed. In the present case the rule was taken to be absolute, and without the deduction.

We are of opinion that the rule in *Martin v. Porter* (a) is correct and properly applicable to the present case. The jury must give compensation for the pecuniary loss sustained by the plaintiff from the trespass committed in taking his coal, compensation having been separately given for all the injury done to the soil by digging, and for the trespass committed in dragging the coal along plaintiff's adit; and the estimate of that loss depends on the value of the coal when severed, i. e. the price at which plaintiff could have sold it. This plainly was the value of the coal itself

(a) 5 M. & W. 351.

(b) *Knowles*, amicus curiæ, mentioned a case before Rolfe B. at the Liverpool assizes, where the

value at the pit's mouth had been adopted as the measure of damages.

at that moment. Defendant had no right to be reimbursed for his own unlawful act in procuring the coal, nor can he, properly speaking, bring any charge against plaintiff for labour expended upon it. But it could have no value as a saleable article without being taken from the pit. Any one purchasing it there would, as of course, have deducted from the price the cost of bringing it to the pit's mouth.

Instances may easily be supposed, where particular circumstances would vary this mode of calculating the damage, but none such appeared here. We do not find that the cost incurred by defendant in bringing the coal to the pit's mouth is greater by a single farthing than that which plaintiff must have incurred for the same purpose. The damages found by the verdict must therefore be reduced by the amount of this charge, which may be ascertained by reference to the judge's note, or there must be a new execution of the writ.

D.

Rule accordingly.

FISHER, Clerk, v. BIRRELL and another, Commissioners,
&c. (a).

ASSUMPSIT on a feigned issue, by the vicar of the parish of Kirkby Lonsdale, in the county of Westmoreland, against the commissioners for valuing tithes, appointed under stat. 4 & 5 Will. 4, c. 9 (private), intituled "An Act to commute for a Corn Rent certain Tithes within the Parish of Kirkby Lonsdale in the County of Westmoreland."


Milk drawn from the cow by hand and given to the calf before it becomes titheable is exempt from tithe as well as milk sucked by the calf.

Section 25 enables any party who shall think himself aggrieved by any determination of the commissioners to bring an action in the King's Bench against them on a feigned issue.

Section 30 enacts, "that in the valuation of the tithe of milk, the said commissioners shall compute the value of

(a) Decided in Trinity Vacation, 1841 (June 19).

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the milk of each milch cow upon each farm, commencing with the fifth cow, subject to a reasonable deduction in respect of such milk as may by law be exempt from the payment of tithe, all milk consumed in the family of the occupier, where such occupier resides in a house of husbandry in the same parish, being considered as exempt from the render of tithes, a due proportion of the milk of the first four cows being included in the calculation."

The first issue raised the following question under the 30th section: "Whether in the valuation of the tithe of milk in the said parish of Kirkby Lonsdale, the said defendants, as such commissioners as aforesaid, duly and properly computed the value of the milk of each milch cow upon each farm, commencing with the fifth cow, subject only to a reasonable deduction in respect of such milk as may by law be exempt from the payment of tithe," &c. pursuing the words of the 30th section as set out above.

There were other issues also, which are not material.

The cause was tried before *Coltman J.*, at the Westmoreland summer assizes, 1839. The estimate of the commissioners was objected to on the ground that they had erroneously decided that the milk given to calves by hand and pail was exempt from tithe as well as that which they sucked from the cow. The learned judge was of opinion that the estimate was right, and the defendants had a verdict on all the issues.

Sir *W. W. Follett S. G.*, in the Michaelmas term following, obtained a rule nisi for a new trial, on the ground of misdirection on the first issue, and also on the ground that the verdict on another issue was against evidence. On the first point he cited *Bosworth v. Limbrick* (a).

Creswell and Armstrong shewed cause (b).

(a) 3 Gwill. 1101; S. C. 2 Eagle & Y. 310, and as *Cullimore v. Bosworth*, 7 Bro. P. C. 57 (3d ed.).

(b) In Easter term, 1841 (May 5), before Lord Denman C. J., *Paterson, Williams and Wightman Js.*

Sir W. W. Follett, Dundas, S. Temple and W. H. Watson,
supported the rule.

Cur. adv. vult.

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Lord DENMAN C. J. delivered the judgment of the Court as follows:—In this case there were, amongst others, two issues, one as to tithe of milk, the other as to tithe of calves.

With respect to the first the learned judge directed the jury that there should be deduction made in respect of milk given to calves, but not sucked by them from the cow. The case of *Bosworth v. Limbrick (a)* was cited to shew that this direction was wrong; but it does not necessarily go that length. It was further urged that the principle on which turnips are titheable must govern this case. It is established in numerous cases that, if turnips be *drawn* and given to milch cows, or other profitable cattle, they are titheable, though if the same cows or cattle had depastured them without their being drawn, the turnips would not be titheable. So it was said, if calves suck the cows, the milk is not titheable, but, if the cows be milked, that milk is titheable, whether applied to the feeding of calves or any other purpose, except the use of the family.

The analogy seems to be perfect; yet we should have hesitated to act upon it, because we do not see any sound principle upon which the decision as to turnips can be justified. But, when we find that the legislature, by stat. 5 & 6 Will. 4, c. 75 (b), has done away with the distinction

(a) 3 Gwill. 1101; S. C. 2 Eagle & Y. 310; S. C. as *Cullimore v. Bosworth*, 7 Bro. P. C. 57, 2d ed.

(b) The statute is as follows: "Whereas it is frequently convenient and necessary, in the agistment of turnips by sheep or cattle, to sever the turnips from the ground, in order that they may be the more easily and completely consumed, and thereby to prevent waste, and it is not reasonable that such severance should vary or affect the payment of tithe: be it therefore en-

acted, &c. that from and after the passing of this act, in all cases where turnips shall be severed in the manner and for the purpose aforesaid, and shall be eaten on the ground by sheep or cattle, and not otherwise removed, the same shall be subject to the payment of tithe in the same manner, and to the same extent as if they had been eaten by such sheep or cattle without having been so severed as aforesaid, and no farther or otherwise."

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in regard to turnips, expressly providing that turnips severed and eaten on the ground shall be titheable in the same manner *only* as if eaten without being severed, we have a different analogy suggested, upon which we have no hesitation in acting.

The judge's direction was said to be wrong, because he had not expressly limited the exception of milk given to calves to the period before the calves themselves were titheable. We do not find that any objection on account of the want of such limitation was made at the trial, and have no doubt that it was understood to be so limited. We therefore think that there was no misdirection.

But upon the second issue we think that the verdict was against the evidence, and therefore there must be a rule absolute for a new trial, as to that issue only, on payment of costs of that issue, and the verdict on all the other issues must stand.

Rule discharged as to the first issue.

D.

Rule absolute as to the second issue.



The QUEEN v. STOCKLEY,
 Same v. Same.

Monday,
 May 23d.

Two indictments against the same defendant, the one for misdemeanour, the other for felony, had been removed into this Court. The Court refused to quash them upon an affidavit stating that they both related to the same transaction.

WORDSWORTH moved for a rule to shew cause why an indictment against the defendant for misdemeanour, preferred and found at the Central Criminal Court, and removed into this Court, and also an indictment against him for felony, preferred and found at the Central Criminal Court and removed into this Court, should not be quashed.

The application was made on an affidavit, stating that on the 28th February last two bills of indictments, subsequently removed into this Court, had been found against the defendant, the one for a misdemeanour in unlawfully disposing of certain French Dutch bonds, which it was alleged had been intrusted to the defendant, and the other

for stealing the same bonds. The affidavit stated that the descriptions of the property in the two indictments were the same in every material particular.

He cited *Rex v. Doran (a)*, where *Eyre C. B.* expressed "a strong disapprobation of the practice of preferring different indictments at the same time on the same cases, for the felony and the misdemeanour; and desired that notice might be sent to the clerk of the iudictments at Hicks's Hall to prevent it in future," and added, "the grand jury cannot with propriety find two indictments for the same offence at the same time, and the continuance of the practice may produce many inconveniences."

LORD DENMAN C. J.—We ought to have a very distinct authority to warrant our interference in the way suggested. The case in *Leach* is not such an authority; it appears merely that the learned judge who had the depositions before him thought the practice wrong, and hoped it would not be continued.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D.

Rule refused.

(a) 1 *Leach C. C.* 538.

The QUEEN v. SCOTT and others.

Tuesday,
June 21st.

INDICTMENT against the defendants for a nuisance to a common public queen's highway. The third count of the indictment charged a nuisance by placing rubbish and erecting a wall upon the highway, and keeping them there.

The Manchester and Leeds Railway Company were empowered by statute to divert the

course of roads, and raise, sink, or deepen them. By a separate section it was enacted, that where in exercise of their powers it should be found necessary to raise, sink, &c. a road, so as to make it impassable or inconvenient, they should, before any such act, cause a sufficient road to be set out as convenient as the road cut through, or as near thereto as might be. The Company having encroached on an old road without making a new one, *held*, that they were indictable for a nuisance, and that it was no answer to that indictment that the state of the earth rendered it impracticable to make a new road.

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The fourth count omitted the allegation of the continuance of the nuisance. Plea: not guilty.

At the trial before *Maule J.* at the York spring assizes, 1841, it appears that this was an indictment preferred against certain persons acting under the direction of the Leeds and Manchester Railway Company. In making the railway, the Company, acting under the 94th section (a) of

(a) Sect. 94. "And be it further enacted, that for the purposes of this act the said Company, their deputies, contractors, servants, agents, surveyors and workmen, and other persons by them authorised are hereby empowered to enter into and upon the lands of any person or corporation whatsoever, according to the provisions and restrictions of this act, and to survey and take levels of the same, or of any part thereof, and to set out and appropriate for the purposes of this act such parts thereof as they are by this act empowered to take or use, and in or upon such lands, and in or upon any lands adjoining thereto, to bore, dig, cut, embank and sough, and to remove or lay, and also to use, work and manufacture any earth, stone, rubbish, trees, gravel or sand, or any other materials or things which may be dug or obtained therein or otherwise in the execution of any of the powers of this act, and which may be proper or necessary for making, maintaining, altering, repairing or using the said railway or other works by this act authorised, or which may obstruct the making, maintaining, altering, repairing or using the same respectively, according to the true intent and meaning of this act, and also for the purposes and according to the provisions and restrictions of

this act to make or construct in, under, upon, across or over the said railway or other works, or in, under, upon, across or over any lands or any hills, vallies, streets, roads, railways or tramroads, rivers, canals, brooks, streams or other waters, such inclined or other planes, tunnels, embankments, bridges, aqueducts, conduits, syphons and drains, whether temporary or permanent, roads, ways, passages, weirs, dams, piers, arches, cuttings and fences, and also to erect and construct such houses, wharfs, warehouses, toll-houses, landing places, engine houses and other buildings, engines, machinery, apparatus and other works, and conveniences for the purposes of this act as they shall think proper, and also to alter the course of any rivers, canals, brooks, streams or water-courses as may be necessary for constructing and maintaining tunnels, bridges or passages, whether temporary or permanent, under or over the same, and also to divert or alter the course of any rivers or streams of water, roads or ways, or to raise, sink or deepen any such rivers, streams, roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway, and to make drains and conduits into, through or under any lands adjoining the said rail-

the Railway Act, had encroached upon a highway called Gooder Lane, in the township of Rastrick. The inhabi-

way for the purpose of conveying water from or to the said railway, and also from time to time to alter, repair or discontinue the before-mentioned works or any of them, and to substitute others in their stead, and to do and execute all other matters or things necessary or convenient for constructing, maintaining, altering or repairing and using the said railway and the other works by this act authorised, they the said Company, their deputies, contractors, agents, servants and workmen doing as little damage as may be in the execution of the several powers to them hereby granted, and the said Company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used or injured, for all damages to be by them sustained in or by the execution of all or any of the powers hereby granted, including also the expenses of all abstracts of titles and other expenses of deducing the title to the several lands to be taken and used by virtue of such powers, and this act shall be sufficient to indemnify the said Company and all other persons whomsoever for what they or any of them shall do by virtue of the powers hereby granted, subject nevertheless to such provisions and restrictions as herein mentioned and contained."

Sect. 97 provides, "That in all cases wherein in the exercise of any of the powers hereby granted any part of any carriage or horse

road or foot road, railway or tram road, quay or wharf, either public or private, shall be found necessary to be cut through, raised, sunk, taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or for the transporting, carrying, conveying, landing, shipping or depositing of any goods or merchandize, or to the persons entitled to the use thereof, the said Company shall at their own expense *before any such road, quay or wharf* shall be so cut through, raised, sunk, taken or injured as aforesaid, cause a good and sufficient carriage or horse road, railway or tram road (as the case may require) to be set out and made instead thereof as convenient for passengers and carriages, or for the transporting, carrying, conveying, landing, shipping or depositing of any goods or merchandize, as the road, quay or wharf to be cut through, raised, sunk, taken or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial order and condition where the former road cannot be more easily restored, and where the road cut through, raised, sunk or injured shall be a turnpike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the principal road shall be restored within six months after the commencement of the operation, and the railway, when it shall cross or run within the distance of twenty yards from the side of any turnpike road, shall be made, fenced off

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tants of Rastrick, who were the prosecutors, contended, that they had no right to do so without providing a substituted road according to sect. 97. This the Company said it was impossible to do under the particular circumstances of the position of the place in question; that a bridge, which the prosecutors suggested might be built, could not be made of the gradient required by the 102d section, and therefore could not be so made as to satisfy the requisitions of the statute. The defendants further contended that the indictment was mistaken, inasmuch as the real ground of complaint was not the encroachment, but the non-performance of the conditions, on which alone, according to the 97th section, the encroachment might lawfully be made, and that the remedy ought therefore to be by mandamus, or indictment to compel the performance of the condition by making a new road. The defendants were found guilty on the counts above mentioned.

A rule for a new trial was obtained on the points above mentioned, as well as on the ground that the verdict was against evidence.

and kept in repair, so as to prevent inconvenience or obstruction to the passage along such turnpike road or accidents thereon.

Sect. 102 enacts, "That where any bridge shall be erected for carrying any turnpike road or any public carriage road over the said railway, the road over such bridge shall be formed, and shall at all times be continued of such width as to leave a clear and open space between the fences of such road of not less than thirty feet for such turnpike road, nor less than fifteen feet for such public carriage road, not being a turnpike road, and the ascent of every such bridge for the purpose of such road shall not be more than one foot in twenty-five feet, and with respect to any pri-

vate carriage road, if the inclination thereof shall be increased, the same shall not be more than one foot in thirteen feet, and a good and sufficient fence shall be made, and at all times thereafter continued and repaired by and at the expense of the said Company, on each side of every such bridge, which fence shall not be less than four feet above the surface of the road over such bridge. Provided, nevertheless, that the regulations hereinbefore contained respecting the ascent or descent of turnpike roads or public carriage roads over or under the said railway shall not apply where the inclination of such roads shall not be increased or altered by the making of the said railway."

Sir *F. Pollock* A.G., *Atcherley* Serjt., *Addison* and *W. H. Watson* shewed cause against the rule for a new trial (a).

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Sir *W. W. Follett* S. G., *Baines* and *Tomlinson* supported it, and cited *Reg. v. The London and Birmingham Railway Company* (b) and *Rex v. Pease* (c).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. The defendants were convicted of a nuisance in obstructing a highway. They pleaded not guilty, and proved on the trial at York that the obstruction was caused by the exercise of certain powers conferred on the Leeds and Manchester Railway Company by their act of incorporation.

Their offer to remedy the evil appeared to us so reasonable that we pressed the prosecutors to accept it, and hoped to be spared the necessity of deciding the question of law, by which defendants sought to shew that what they have done is lawful. The prosecutors, however, who are the surveyors of the highways, crave our judgment on this point.

The work complained of as a nuisance, and undoubtedly making one, is the *cutting through* of the carriage road. Now there is no question as to their right to do this, and, though they are required when they do it to cause another road to be set out and made instead of it, they argue that they are no longer indictable for a nuisance in doing the lawful act, however they may be for disobedience of the law in neglecting to substitute another. The prosecutors reply by referring to the section (97) which requires the Company to cause the new road to be made before they cut through the old. But the Company rejoin that from the state of the earth there it was impossible to do this, and could not be intended by the legislature. This argument we think

(a) Saturday, June 4th, before Lord Denman C. J. *Patteson*, *Williams* and *Coleridge* Js.

(b) 1 Railway Cases, 317.

(c) 4 B. & Ad. 30; S. C. 1 N. & M. 690.

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inadmissible, for reasons too obvious to require a full statement of them. The Company have done what the act legalises only on a condition which they have not performed. They stand convicted of the nuisance, and shew no justification. The verdict will therefore not be disturbed, but we still hope that the parties may consent to an arrangement useful to the public.

G.

Rule discharged.

Monday,
 June 6th.

ROWLAND v. BLAKESLEY and others.

1. The general rule, of T. T. 1 Vict., that a defendant need not plead payment of any sums for which credit has been given him in the plaintiff's particulars, does not apply to set-off.

2. Evidence of an agreement to set off mutual demands does not support a plea of payment. (See *Palmer v. Costerton*, in note.)

INDEBITATUS assumpsit.

Plea (among others), set-off. Replication, non-assumpsit. Issue thereon.

The plaintiff's particulars stated that the action was brought to recover 161*l*. "due on the following items of account." Then followed the items of the claim against the defendants, amounting to 2432*l*(a). The particulars then proceeded to state, "the plaintiff is willing to give, and hereby offers to give, credit to the defendants for the following items, which leaves the above balance of 161*l*." Then followed items of set-off due from the plaintiff to the defendants to the amount of about 600*l*., which with other items of payments, &c. made the amount of credit given 227*l*.

On the trial before Lord Denman C. J. at the London sittings after Easter term, 1841, the plaintiff gave evidence in support of the balance claimed, but the amount proved was less than the amount of items of set-off admitted in the particulars. It was contended for the defendants that the plaintiff had made out no case, as the items of set-off admitted by the plaintiff exceeded the sum which he had proved. For the plaintiff it was said that the particulars were not in evidence. The particulars were then put in as

(a) *Quere*, whether it should not have been 2332*l*.

evidence for the defendants, who claimed the verdict. His lordship was of opinion that the bill of particulars must be taken altogether, and that, as it claimed a balance in the plaintiff's favour, the plaintiff's case was not answered by items of set-off as conclusive against him, without reference to the rest of the particulars.

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Crowder in the Trinity term following obtained a rule nisi for a nonsuit or for a new trial.

Platt and *Peacock* now shewed cause, and contended that, as the rule of Trinity term, 1 *Vict.* (a) applied to payments only, the defendant should have proved his set-off instead of treating it as admitted in the particulars and as so much waived by the plaintiff.

Crowder and *C. A. Wood* contra. The new rule was made merely to reconcile the decisions in the Courts of Common Pleas and of the Exchequer with respect to the pleading and proving payment: *Ernest v. Brown* (b), and *Kenyon v. Wakes* (c). But it must not be implied from this rule that a set-off must be pleaded and proved, just as if credit had not been given for it in the particulars. It is unreasonable that the plaintiff should by his particulars give notice to the defendant that certain items in the defendant's favour are admitted and then be allowed to dispute them at the trial. If this is allowed, the particulars will prejudice and embarrass the defendant instead of assisting him. The particulars are for the defendant's benefit: *Booth v. Howard* (d) and *Kenyon v. Wakes* (c). *Eastwick v. Harman* (e), *Freeman v. Crafts* (f) and *James v. Lingham* (g) appear to shew that the defendant in this case had merely to meet the balance. The particulars of the plaintiff did not merely

(a) 3 N. & P. 380,

(b) 3 Bing. N. C. 674.

(c) 2 M. & W. 764.

(d) 5 Dowl. P. C. 438.

(e) 6 M. & W. 13.

(f) 4 M. & W. 4.

(g) 5 Bing. N. C. 553.

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state that he sought to recover a certain balance, but they gave credit for particular sums, so that the analogy of the new rule is in favour of the defendants.

Lord DENMAN C. J.—I did not mean to say that the jury might not believe one part rather than another of the plaintiff's particulars, or to say any thing to prevent the counsel for the plaintiff from addressing the jury, and inducing them to adopt his view of the case. I merely meant that the defendant could not select one part of the particulars exclusively as his own evidence, but that he made the whole of the particulars evidence, and that they must be taken altogether. Nothing was said as to taking the opinion of the jury, and asking them how much of either side of the particulars they believed.

The rule of Trinity term, 1 *Vict.* was not brought to my notice, but it clearly applies to payments only, and not to set-off.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged(a).

(a) The particulars in this case also gave credit for certain payments which had not been allowed by the jury. The Court reduced the damages by the amount of such payments.

In *Palmer v. Costerton*, tried at the Norfolk Spring Assizes, 1843, *Tindal* C. J. held that an agreement between the plaintiff and the defendant to set off mutual demands did not support a plea of payment. *Byles* Serjt., in the

following term, moved for a new trial, contending that such an agreement was in substance the same thing as if each party had received the sum due to him and then handed it back to satisfy the claim against him. But this Court, consisting of Lord Denman C. J. *Patteson* and *Williams* Js., confirmed the ruling of the Lord Chief Justice, and refused the rule on this point.

D.

END OF TRINITY TERM.

TRINITY VACATION.

The QUEEN v. BOUCHER (*a*).

AT the general quarter sessions of the peace for the county of Warwick, 19th Oct. 1841, a county rate was ordered to be raised by one general rate or assessment upon every parish, township, and other place within the said county.

By the rate or assessment then and there made in pursuance of the said order, and so annexed thereto as aforesaid, the messuages, lands, tenements, and hereditaments, situate within the parish of Birmingham, were assessed thereto at the sum of 1599*l.* 6*s.* 8*d.*, and the justices issued their order at the said Court to the high constable of the hundred of Hemlingford, (within which division the whole of the parish of Birmingham aforesaid is situate,) thereby ordering him (amongst other things) to demand, collect, and receive from the overseers of the poor of the said parish the said sum of 1599*l.* 6*s.* 8*d.*, and the said high constable thereupon, on the 28th of October aforesaid, issued his warrant, directed to the churchwardens and overseers of the poor of the said parish of Birmingham, requiring them, at a time and place therein specified, to pay to him the said sum of 1599*l.* 6*s.* 8*d.* so assessed as aforesaid. The said rate and orders of the said justices were in H. T. 1842, duly removed by a writ of certiorari into the Court of Queen Bench, at the instance of two of the inhabitants of the said parish, rated to and liable to be

Under the stat. 7 *Will.* 4 and 1 *Vict.* c. 78, the crown may grant a charter of incorporation, though the petition for it be not actually signed by a majority either in persons or property of the inhabitant householders.

There having been a de facto grant of a charter of incorporation to a town within a county, and a de facto grant of a separate court of quarter sessions to it, the Court quashed a county-rate which included that town, and refused to entertain objections to the validity of the grant of quarter sessions, on the ground that the grant of the crown ought in such a case to be directly impeached by scire facias.

(*a*) This case was argued on a concilium at the sittings after T. T. (Tuesday, June 21,) before Lord Denman C. J., Patteson, Williams

and Coleridge Js. The Court gave judgment at the same sittings, (June 25).

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rated to the relief of the poor thereof, and a rule being moved for, calling upon the justices of the county of Warwick to shew cause why the said rate or assessment, and the said orders of the said justices, or so much thereof respectively as related to the parish of Birmingham, should not be quashed, it was suggested by the Court that the facts should be stated in the form of a special case for the opinion of the Court.

Case. The parish of Birmingham is situate within the county of Warwick, and, until the granting of the separate court of quarter sessions hereinafter mentioned, was chargeable with and liable to contribute to the county rates of and for the said county.

By the act of parliament passed in the third year of the reign of his late majesty King William the Fourth to settle and describe the divisions of the counties and the limits of cities and boroughs in England and Wales, in so far as respects the election of members to serve in parliament, it was enacted and declared that the borough of Birmingham should, as to the election of members to serve in parliament, include and be comprised within the respective parishes of Birmingham and Edgbaston, and the several townships of Bordesley, Duddeston and Nechelles, and Deritend.

The inhabitants of the borough of Birmingham, comprised within the district hereinbefore described, being or assuming to be incorporated by virtue of a royal charter, (hereinafter more particularly mentioned,) bearing date the 31st October, 1838, the council of the said borough presented a petition to her majesty in council in the month of March, 1839, whereby, after representing (amongst other things) to her said majesty, "that there was then already a commodious gaol in the said borough of Birmingham, which at a trifling expense might be made suitable to the confinement of prisoners during the sessions," the said council humbly prayed that her majesty would be graciously pleased to grant that a separate court of quarter sessions

of the peace should thenceforth be holden in and for the said borough.

By charter bearing date the 3d day of May, A.D. 1839, her majesty in compliance with the said petition granted unto the said borough that a separate court of quarter sessions of the peace should thenceforward be holden in and for such borough, according to the provisions of the act passed in the sixth year of the reign of his late majesty King William the Fourth, intituled, "An Act to provide for the Regulation of Municipal Corporations in England and Wales." And her said majesty was shortly afterwards pleased to nominate and appoint *Matthew Davenport Hill*, Esq. barrister at law, to be the recorder of the said borough.

At the time when the said council of the borough of Birmingham so presented their said petition there was not, in fact, nor at any time since hath there in fact been, any gaol or house of correction in the borough of Birmingham.

Within ten days after the said grant of the separate court of quarter sessions, the council of the said borough sent a copy of such grant to the clerk of the peace of the said county. And a separate court of quarter sessions of the peace hath since the said last mentioned grant been in fact from time to time regularly and at the accustomed period holden in and for the said borough, before the said recorder, and all such offences and matters as are usually cognizable at courts of quarter sessions of the peace in England have, when committed within the said borough, since the granting of such separate court of quarter sessions, been tried and inquired into at such separate court, save and except the offences and matters which in due course ought to have been tried and inquired into at the quarter sessions of the peace holden at Michaelmas, 1840, and Epiphany, 1841, and at the adjourned quarter sessions of the peace holden in March, 1841.

The expenses of prosecutions at the separate court of quarter sessions for the borough from the time of the

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grant thereof until the quarter sessions holden at Michaelmas, 1840, were paid by the treasurer of the borough out of money advanced by her majesty's government to the town council, and which still remains due and owing to the government; the expenses of the prosecutions at the several separate courts of quarter sessions for the borough, holden since the said adjourned court in March, 1841, have been paid out of the borough fund of the said borough. But at the times of the holding of the said three separate courts before mentioned, (viz. at Michaelmas, 1840, Epiphany, 1841, and March, 1841,) the council of the borough had no funds whereout to defray the expenses of prosecutions, the recorder of the borough consequently declined to try the offenders committed to take their trial at those three courts, and adjourned his court on each occasion immediately after opening the same, and the prisoners so committed as last aforesaid were on that account and on those occasions, in fact, tried at the quarter sessions for the county of Warwick, and the expenses of those prosecutions were paid out of the county fund.

In consequence of there being no gaol or house of correction within the said borough, the course hath always been and is, that all persons committed to take their trial at the borough sessions by virtue of the said grant, have been and are conveyed to the county gaol at Warwick, (about twenty miles distant from the said borough,) for safe custody, and brought back again to the borough for trial at the said separate court of quarter sessions, and prisoners convicted thereat have been and are reconveyed to the said county gaol, there to undergo, and have in fact there undergone, their sentences, and the expense of such conveyance and reconveyance has always been paid by the treasurer of the borough.

No contract has at any time been entered into between the town council and the county justices for or relating to the maintenance of such prisoners, and the expense of maintaining them has in fact been always paid out of the

county fund, and in like manner the costs incurred by the prosecution of offenders committed from the borough and tried at the assizes for the county have also been paid out of the county fund.

Several county rates have been made and levied for the county of Warwick since the granting to the said borough of the separate court of quarter sessions of the peace, but the parish of Birmingham has never been included in or assessed to any such county rate made since the said grant until the making of the said rate or assessment on the 19th day of October, 1841.

In the month of June, 1839, the town council of the borough made a borough rate for the said borough in the nature of a county rate, in and to which the said parish of Birmingham was assessed by the council at the sum of 873*l.* 19*s.* 8*d.*, but the overseers of the poor of the said parish, being advised that it was very doubtful whether the council had a right to make that rate, refused to pay the sum assessed on the said parish. In the month of February, 1841, the town council made another borough rate in the nature of a county rate, in and to which the said parish of Birmingham was assessed at the sum of 516*l.* 10*s.* 6*d.*, and the overseers of the poor of the said parish had in fact a considerable part of that assessment, and were in the course of paying the residue thereof at the time of the making the said county rate on the 19th October, 1841.

On the 12th October, in the same year, the council of the borough made a third borough rate in the nature of a county rate, in and to which the said parish of Birmingham was assessed at the sum of 4479*l.* 6*s.* 7*d.*, and the said last mentioned assessment, at the time of the issuing of the writ of certiorari before mentioned, was in regular course of payment by the said overseers.

The whole of the parish of Birmingham is situate within the limits of the borough of Birmingham as settled and described by the said act, passed in the third year of the reign of his late majesty King William the Fourth, and

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within the district comprised in the said charter, bearing date the 31st October, 1838.

On behalf of the prosecutors of the said writ of certiorari it is contended, that in consequence of such grant of a separate court of quarter sessions of the peace to the said borough, and of a copy of such grant having been so as aforesaid sent to the clerk of the peace of the said county, the county justices had no authority to assess the messuages, lands, tenements, or hereditaments situate in the parish of Birmingham to the said county rate, so as aforesaid made on the 19th day of October, 1841, as aforesaid.

The county justices, on the other hand, insist that as there was not at the time of the making the said grant, nor at any time since hath been, any gaol within the borough of Birmingham, and as the whole expense of maintaining offenders committed for trial at such separate court of quarter sessions for offences within the borough hath in consequence thereof fallen on and been defrayed out of the general county rates of the said county, and as the treasurer of the said county hath never received any sum in aid or on account of the county rate from the council or treasurer of the said borough, and as in consequence of there being no gaol within the said borough no contract could, as they allege, be entered into with the county justices for the maintenance of the borough prisoners in the county gaol and house of correction, and the above expense is not therefore, as they allege, legally recoverable from the said borough, the county justices had authority to include the borough of Birmingham in the assessment to the said county rate so made on the 19th October, 1841. It is moreover contended, in support of the said rate, that the said grant of a separate court of quarter sessions of the peace of the said borough of Birmingham is void on two grounds.

First.—That her majesty was deceived by the petition before mentioned, and induced to make the said grant by

the untrue allegations contained in the said petition, that there was then a commodious gaol in the said borough, whereas in truth there was not at the time of the said petition, or of the said grant being made, nor at any time since hath there been, any gaol whatever within the said borough.

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Secondly.—That the said charter of incorporation of the said borough, bearing date the 31st day of October, A. D. 1838, was for the reasons hereinafter stated void; or, if not void, still that the same did not, nor could legally vest in the town council of the said borough the right of ordering a borough rate in the nature of a county rate to be made within and for the said borough, nor was it under such circumstances competent to her majesty to grant unto the said borough, (so incorporated by such charter,) that a separate court of quarter sessions of the peace should be holden in and for such borough according to the provisions of the said act, 5 & 6 *Will. 4*, c. 76.

A copy of the charter of incorporation accompanies this case. Several objections have been raised to its validity as a charter to take effect under the last mentioned act, and it is thought convenient to state shortly the substance of some of the principal of those objections.

First.—That the charter was not granted (and it is agreed to be admitted on the argument on this case that it was not in fact granted) on the petition of the whole or of the majority either in number or property of the inhabitants householders, or of the whole or of a majority either in number or property of the male inhabitant householders of the town of Birmingham.

Secondly.—That the charter varies from the provisions of the act of parliament in regard to the persons by whom it directs divers important acts to be performed; for instance, in directing the burgess list to be prepared by *William Scholefield*, Esq. instead of by the overseers of the poor, and in directing the same list to be revised by *Horatio Waddington*, Esq. instead of by the mayor and assessors,

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and in directing the lists of claimants and of the persons objected to to be made out by the said *William Scholefield*, Esq. instead of by the town clerk.

Thirdly.—That the charter contains no provisions for dividing the borough into wards, or for determining or setting out the extent and boundary of such wards, or what portions of such borough should be included therein respectively, in the manner directed by the 39th sect. of the said act for the regulation of municipal corporations in England and Wales, neither was any barrister appointed for the purpose aforesaid; but the borough is by the said charter itself divided, or purports to be divided, into several wards therein specified, and the extent, limits, and boundary of such wards, and what portions of such borough were to be included therein, are by the said charter itself determined and settled, or purport to be determined and settled.

Fourthly.—That the charter varies from the provisions of the act of parliament as to the time when several important acts are to be performed, for instance, as to the time when the burgess lists are to be prepared and affixed for public inspection, and as to when claims to vote and notices of objections are to be sent in, and as to when the lists of claimants and of persons objected to are to be affixed to the town hall, and as to when the burgess lists are to be revised, and as to when the mayor, aldermen, and councillors, are respectively to be elected.

Under all these circumstances, the question for the opinion of the Court is, whether the justices of the peace of the county of Warwick had authority to assess messuages, lands, tenements, and hereditaments situate within the borough of Birmingham, to the said general county rate or assessment so made by order of the said justices at the said court of general quarter sessions of the peace holden at Warwick in and for the said county, on the 19th October, 1841. If the Court shall be of opinion that the justices of the peace of the said county had such authority,

then the orders of the said justices and the said general county rate or assessment so made as aforesaid are to be affirmed. If the Court shall be of opinion that the said justices of the peace had not such authority, then so much of the said rate or assessment as purports to assess the parish of Birmingham at the sum of 1599*l.* 0*s.* 8*d.*, and of the order directing the same to be made, and so much of the said order of the said justices to the high constable of the hundred of Hemlingford as commands him to collect and receive the said last mentioned sum from the overseers of the said parish, are to be quashed.

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Whateley against the order of sessions. The 112th section of the Municipal Corporation Act (5 & 6 *Will.* 4, c. 76,) exempts boroughs from the county rate after the grant of a separate court of quarter sessions has been duly notified to the clerk of the peace of the county. But to avoid the effect of that enactment it is here contended:—first, that the borough was not duly and validly incorporated; and, secondly, that if it be, still there has been no valid grant of quarter sessions to the borough.

1. As to the first ground, all the objections raised in this case to the charter of incorporation are disposed of by the decision of the Court of Exchequer Chamber in *Rutter v. Chapman* (a). 2. The second ground is, that the grant of separate sessions is not valid, because it is said the conditions were not complied with, which, it is urged, are precedent to the power of the crown to make the grant. But, even if this be so, this Court will not in this mode determine the validity of the grant, but leave the parties disputing to their remedy by *scire facias*: *Vin. Abr. Prerogative* (O. b); *Id.* (S. b); *Rex et Reg. v. Kemp* (b); *Keilway*, 196 b; 4 *Inst.* 88; 2 *Roll. Abr. Prerogative le Roy*, S.; 9 *Co.* 95 b; *Dyer*, 198, a, b; *Sir R. Chester's case, Dyer*, 211 a; *Com. Dig.* (Officer, K. 11, 12); *Rex v. Sir Oliver Butler* (c).

(a) 8 M. & W. 1.

(c) 3 Lev. 220; S. C. 2 Vent. 344.

(b) 12 Mod. 77.

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The instance of patents for inventions, which it is truly said are daily impeached in a collateral proceeding, is in favour of the argument, because the grant always contains a proviso of defeasance, if the legal conditions have not been complied with. If it were not for that proviso, the ordinary rule would apply, that a grant from the crown cannot be repealed but by matter of record.

Mellor contra. Whether this charter and this grant of quarter sessions be good at common law, or not, is immaterial, because it must be shewn, in order to relieve the borough of Birmingham from contribution to the county rate, that they are good under the powers conferred on the crown by the Municipal Corporation Act. The onus is on the other side to shew exemptions from the general law.

The validity of the grant of quarter sessions may be questioned in this mode. The justices and inhabitants of the county of Warwick are interested, and their interests and rights must be judicially determined, though to determine them it may be necessary incidentally to examine the validity of an act of the crown: *Com. Dig. F. 1.* It was conceded in *Rutter v. Chapman* that a scire facias was not the only mode of discussing the validity of the charter. [*Patteson J.* In *Reg. v. Taylor (a)* this Court refused to grant a quo warranto against an officer of a corporation where the object of the proceeding was to try the validity of the charter of incorporation. *Reg. v. Davies (b)* was earlier than that case, but there the objection was not taken.] In this case the rights of private parties are involved, and statutes affecting them must be looked upon as deeds, or instruments of a solemn nature inter partes, and as such receive a judicial construction. The grant here in question is not one within the admitted common law prerogative of the crown, but one depending upon a power conferred by a statute, the terms and conditions attached to which it must be shewn have been complied with.

(a) 11 A. & E. 949; S.C. 3 P. & D. 652.

(b) Not reported.

This case is different from *Rutter v. Chapman*, inasmuch as it is here expressly found that the charter was not granted upon a petition of a majority, either in number or property of the inhabitant householders. [*Patteson J.* You cannot succeed in your argument, unless you can convince us that the petition must proceed from an actual majority.] If the petition had proceeded from a majority or meeting of inhabitants householders duly convened, that might have been taken as the expression of the opinion of the majority of all, but it does not appear that this was so. [*Patteson J.* It does not appear that it was not.]

He then contended that the non-existence of a gaol at the time of the grant of a separate court of quarter sessions was fatal to the validity of the grant. He cited the case of *Reg. v. The Justices of Lancashire (b)*, which the Court observed depended on the construction to be given to the stat. 5 Geo. 4, c. 85.

Whateley replied.

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court.—The question for the opinion of the Court in this case is, “whether the justices of the peace of the county of Warwick had authority to assess messuages, lands, tenements, and hereditaments, situate within the borough of Birmingham, to the general county rate.” And that question must depend on this, whether the borough of Birmingham has been in due form of law incorporated by a charter of her majesty, granted to the inhabitants of the said borough in the second year of her reign, and, moreover, whether the charter of the Queen, of May 3d, 1839, granting to the borough a separate court of quarter sessions, be valid.

Primâ facie the town of Birmingham having been (before the said charter) situate within and parcel of the said

(b) 3 P. & D. 86.

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county of Warwick, is liable to be assessed to the said county rate, except the exemption above mentioned be satisfactorily established. And that depends upon the legality of the said last mentioned charter ; because, if that be legal, the borough of Birmingham, by virtue thereof, becomes exempt from the contribution to a county rate.

Several objections to the validity of the said first mentioned charter were pointed out in the statement of the case for our opinion, for the purpose of shewing that there existed no legal borough, to which the grant of a separate court of quarter sessions could be made. The learned counsel, however, who argued in support of the order of sessions, abandoned all except two, as having been disposed of by the decision in the case of *Rutter v. Chapman*.

As to one of those objections to the first mentioned charter, however, it was contended, that the present case is distinguishable from that referred to in this respect, that, whereas in that case it only appeared *inferentially*, it is here *directly stated* that the charter was granted upon the petition of a less number than the majority of the inhabitant householders. We are all of opinion, however, that the view taken of this subject in the case of *Rutter v. Chapman* is applicable also to this case, and disposes of the objection.

The other objection, which is to the latter charter, is attended with much more difficulty, and if we had thought that it came before us *directly* for decision, we should certainly have taken further time for consideration. This objection depends upon the 103d sect. of the act in question ; it is required that "*the state of the gaol*" in the borough petitioning for a charter shall be set forth in the petition. From this it is *inferred*, (and we think that there is great weight in the argument,) that there must, in fact, be a gaol in existence at the time of so petitioning the Queen, and that none such did exist at that time or any time since in the borough of Birmingham ; that if such fact did not exist, the Queen was deceived in her grant, and that such

defect would be a ground for invalidating it altogether. But a doubt has arisen whether, in the present state of the case, this important question be really raised.

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The borough of Birmingham as duly incorporated does exist *in fact*. The same observation applies as to the second charter of the Queen, and the holding of courts of quarter sessions thereunder. The validity of the first charter and of the incorporation by virtue of it, and the legality of the court of quarter sessions under the second charter is *incidentally* (and so only) impeached. No person connected with the borough itself complains of that incorporation, or of the holding of the court of quarter sessions being illegal. The illegality of the charters is for the purpose of assessing the borough *assumed*, whereas another and more formal method of questioning their legality is open. It is competent by the writ of *sci. fa. directly* to ascertain whether the grant of the Queen of a separate court of quarter sessions be invalid or not. And, in the absence of such proceeding, we think that we are not called upon to pronounce any opinion upon the effect of this objection, but that the state of things *as we find them* must be sustained, and the order of sessions, for that reason *only*, cannot be supported. We are strongly impressed with the inconvenience of deciding upon a case of so much importance in this form of proceeding. Whereas by another (to which we have already referred,) the question may be raised in such a manner as not only to challenge those immediately interested in the continuance of the charter to maintain its validity, but the decision, whatever it may be, will be directly given on the point, and subject to further consideration and review.

G.

Rate on the borough quashed.



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Saturday,
June 25th.

The 5 & 6 Will. 4, c. 74, s. 1, which enacts that no proceeding shall be had in his Majesty's Courts "for or in respect of any tithes" under the yearly value of 10*l.*, but that all complaints touching the same shall be summarily determined by justices, under the provisions of former statutes, unless the title is in question, takes away the right of action to recover treble value for not setting out tithes of such yearly value, under 2 & 3 Edw. 6, c. 13, s. 1.

PEYTON, Clerk, v. WATSON.

DEBT to recover a penalty for not setting out tithes of "corn, grain, wheat and hay." The declaration claimed 90*l.*, being the treble value of the said tenth part of the corn, &c. not set out.

Plea: nil debet (by statute) and issue thereon.

The cause was tried before *Alderson* B. at the Cambridge summer assizes, 1841. The defendant had occupied the land from which the tithe was claimed from 1834 to 1839, without setting out tithes. It appeared that the yearly amount of the tithe claimed was under 10*l.* It was thereupon objected that the statute 5 & 6 Will. 4, c. 74, had taken away the right of action, and that the plaintiff should have proceeded summarily before two justices, under the provisions of the 53 Geo. 3, c. 127. The learned judge was of opinion that, as this was not an action for the recovery of tithes, but an action under 2 & 3 Edw. 6, c. 13, to recover a penalty for not setting out tithe, the 5 & 6 Will. 4, c. 74, did not apply, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit or a verdict for the defendant.

Biggs Andrews, in the Michaelmas term following, having obtained a rule accordingly,

Byles now shewed cause. The new Tithe Act(a) does

(a) The statute 5 & 6 Will. 4, c. 74, s. 1, after reciting 7 & 8 Will. 3, c. 6, and 53 Geo. 3, c. 127, enacts, "that from and after the passing of this act, no suit or other proceeding shall be had or instituted in any of his Majesty's Courts in England, now having cognizance of such matter, *for or in respect of* any tithes, oblations or compositions withheld, of or under the yearly value of 10*l.* (save and except in the cases provided for in the two first-recited acts), but that

all complaints touching the same shall, except in the case of Quakers, be heard and determined only under the powers and provisions contained in the said two first-recited acts of parliament, in such and the same manner as if the same were herein set forth and re-enacted." At the end of the section is a proviso, "Provided always, that nothing hereinbefore contained shall extend to any case in which the actual title to any tithe, oblation, composition, mo-

not deprive the plaintiff of his right of action for penalties. The statute applies only to actions and suits to recover tithes.

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Biggs Andrews contra was not heard.

LORD DENMAN C. J.—If the learned judge who tried this case had expressed any strong opinion on the point, we should have desired to hear it discussed more fully. The statute does not apply in terms, certainly, to an action for penalties; but the prohibition against proceeding in the superior Courts “for or in respect of any tithes” is sufficient to include an action to recover penalties for not setting out tithes. We think it clear that the right of action is gone.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

due, due or demand, or the rate of such composition or modus, or the actual liability or exemption of the property to or from any such tithe, oblation, composition, modus, due or demand, shall be bonâ fide in question, nor to any case in which any suit or other proceeding shall have been actually instituted before the passing of this act.”

D.

DANIELS v. GOMPERTZ (a).

PLATT, in Easter term last, had obtained a rule, calling upon the defendant to shew cause why an attachment should not issue against him for a contempt of process. The charge was, that the defendant had improperly ruled the sheriff to return a writ of alias ca. sa. against him in this action, in order to elude its execution.

A writ of ca. sa. for debt and costs in this action had been returned non est inventus on the 28th January last. The alias ca. sa. was then issued, which the plaintiff found

Before execution of a ca. sa. against defendant, and before any satisfaction or compromise of the plaintiff's claim, the defendant ruled the sheriff to return the writ.

Admitted that the defendant had no right to rule the sheriff under these circumstances.

(a) Decided during term (June 2).

rule the sheriff under these circumstances.

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had also been returned non est inventus on the 9th April last. The defendant had ruled the sheriff to return this writ. The debt and costs had not been satisfied, nor had there been any settlement of the plaintiff's claim.

The defendant made an affidavit in answer, stating that he ruled the sheriff under the impression that he had a right to do so, and that he derived this impression from the general words of the marginal note and of the judgment in *France v. Clarkson* (a). The marginal note to that case is, "The defendant as well as the plaintiff may rule the sheriff to return the writ," and the report of the learned judge's judgment commences, "I do not see why the defendant should not be at liberty to rule the sheriff to return the writ as well as the plaintiff (b)."

Erle and *Kelly*, on shewing cause, admitted the defendant's conduct to be irregular, but contended that there was probable ground for his mistake, and referred to *Watson* on Sheriff, p. 64, and *Archb. Pr.* 410, (7th ed.) where it was stated in general terms, without explanation, that the sheriff might be ruled to return the writ either by the plaintiff or the defendant.

Platt and *Atkinson* contra.

LORD DENMAN C. J.—I do not know where we should stop, if we were to punish for contempt under the circumstances of the present case.

PATTERSON, WILLIAMS and COLERIDGE Js. concurred.

Rule discharged.

(a) 2 Dowl. P. C. 532.

(b) It will be seen, on reference to that case, that the writ had been executed. The defendant, on his arrest, deposited the amount of the debt with the sheriff, and also 10*l.*

D.

for costs, and yet the sheriff had neither returned the writ nor paid the money into Court. The authority of that case therefore is not impugned by the present. See also *Edmunds v. Watson*, 7 Taunt. 5.

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Friday,
June 24th.

CARR v. FOSTER and others.

CASE for disturbance of common of pasture. The declaration stated that at the time when &c. the plaintiff was possessed of a messuage and land with the appurtenances, and by reason thereof was entitled to common of pasture for his commonable cattle levant and couchant every year and at all times of the year as to the said messuage and land &c. appertaining.

Pleas:—1. Not guilty.

2. A traverse of the plaintiff's possession of the land, with the appurtenances &c.

3. That the plaintiff ought not by reason of the possession of the messuage and land of right to have had, nor still of right ought he to have, common of pasture for all his commonable cattle &c. as alleged in the declaration.

Replications joining issue thereon.

The case was tried before Lord *Denman* C. J. at the Yorkshire summer assizes, 1841. The plaintiff, who was tenant of a farm, proved an exercise of the right by former tenants commencing more than thirty years before action brought. There was then a cesser for about two years, 1821 and 1822, during which time the landlord himself was in possession, who had no commonable cattle. The user was afterwards resumed by the tenants and continued down to the time of bringing the action.

For the defendants it was objected that there was a gap in the title, and that the right had not been enjoyed for the full period of thirty years, within the 2 & 3 *Will.* 4, c. 71. His lordship left it to the jury to say whether the right had been substantially enjoyed for the period of thirty years.

Verdict for the plaintiff, with leave to move to enter the verdict for the defendant.

Cresswell in the Michaelmas term following moved accordingly, and also for a new trial.

Where a right of common had been exercised by the tenants of a farm for more than thirty years before action, except for about two years in the middle of the period, when the landlord was in possession, who had no commonable cattle,

Held, that such non-user was not an "interruption" within 2 & 3 *Will.* 4, c. 71, and that it was correctly left to the jury to say whether the right had been substantially enjoyed for the full period of thirty years.

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*Dundas and Wortley* shewed cause. The claim was made out at common law. On the trial the plaintiff certainly rested his case on the statute; but, even if he is to be held to this, there was abundant evidence to support the finding of the jury, and the question was correctly left to them. By the 1st sect. of stat. 2 & 3 *Will.* 4, c. 71, a right of common, after enjoyment for thirty years without *interruption*, is not to be defeated by shewing only that the enjoyment commenced "at any time prior to such period of thirty years." And by the 4th sect. no *act* shall be deemed an interruption "unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof." It is clear that the word "interruption" is intended to express some act done by another person in obstruction of the enjoyment, and that the word does not contemplate the mere intermission of the enjoyment by the party claiming: *Bailey v. Appleyard* (a); *Flight v. Thomas* (b). Unless it is necessary to shew an enjoyment for every hour during the thirty years, it must be a question for the jury whether there has been substantially the full period of enjoyment. A right of common in its nature is exercisable only at certain seasons of the year, and when the claimant happens to have commonable cattle. The non-user in the present case occurred at the time when the landlord, who had no commonable cattle, was in possession of the farm. The defendants will rely on the 6th sect., which provides, "that no presumption shall be allowed or made in support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number of years mentioned in this act as may be applicable to the case and the nature of the claim." Under this provision it may be requisite that there should be an actual beginning of the enjoyment as far back as thirty years before the action, and the want

(a) 8 A. E. 778; S. C. 2 P. & D. 1.

(b) 11 A. & E. 688; S. C. 3 P. & D. 442.

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of a proper beginning to the period was fatal to the claim in *Bailey v. Appleyard* (a). On the other hand, in *Parker v. Mitchell* (b) there was no proof of enjoyment during the latter part of the statutory period, viz. for four years before the action. There the claim was to a way under the second section. That section supports the claimant after twenty years enjoyment of the "way," whereas the first section supports the claimant after enjoyment of the "right" for the requisite period, as if unintermitted actual user were not contemplated. In *Payne v. Shedden* (c), a plea of twenty years' user of a right of way was held not to be defeated by a temporary non-user under an agreement.

*Watson* and *H. Hill* contra. The statute requires the enjoyment to be for the full period specified, and no part of the period is to be founded on presumption. It cannot matter, therefore, whether the non-user has been at the beginning, the middle, or the end of the period. *Parker v. Mitchell* (b) therefore is in point. [*Patteson* J. That case turned upon the 4th section, which says that the period is to be the period next before some suit. There was no user for the last four years, so that the claimant could not begin with the action and trace the period back. In *Payne v. Shedden* (c) my notion was that, where a person gives me something in consideration of my not using my old right, I may be said to enjoy the right during the time that I enjoy the consideration. *Hall v. Swift* (d) seems to be at variance with *Bailey v. Appleyard* (a)]. In *Wright v. Williams* (e) the Court of Exchequer thought it necessary to follow the words of the statute, notwithstanding the many absurdities which were pointed out as consequent upon such a construction. The statute is explicit, that the period of enjoyment is to be the full period, and that there is to be no presumption of a longer period from proof of a less. The

(a) 8 A. & E. 778; S. C. 2 P. & D. 1.

(b) 11 A. & E. 788; S. C. 3 P. & D. 655.

(c) 1 M. & Rob. 382.

(d) 4 Bing. N. C. 382.

(e) 1 M. & W. 77.

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expressions interruption for a "year," "periods of years," and "number of years" seem to indicate that a non-user for a whole year will invalidate the right.

LORD DENMAN C. J.—I think the period of thirty years was made out. There must be some interval in the actual enjoyment of almost every right. In such cases I think it must be for the jury to say whether there has been substantially the requisite enjoyment. It is contended that intermission for so long a time as a year, at all events, will vitiate the claim. But the word in the statute is "interruption" and not "intermission." An intermission may be explained. The object of the 6th section was to encounter the old practice of presuming the longer period from proof of the shorter, but I do not think it was intended to interfere with the mode of *proof*. The question here is, whether there was not proof of the necessary period, without reference to presumption. Surely, as a matter of proof, you may infer from the enjoyment both before and after the user, that the right was enjoyed throughout the full period.

PATTERSON J.—I think in this case there is no difficulty in construing the act. The interruption spoken of in the 1st section is clearly an obstruction by other persons, and not a mere intermission by the claimant. This is clear from the 4th section, which speaks of the claimant "acquiescing" in the interruption. The case of the defendants does not seem to be put so much upon an alleged interruption, but rather upon the 6th section, which says that no presumption shall be allowed in favour of a claim upon proof of enjoyment for a less period than the act has specified. But is any such presumption necessary to support the claim in this case? The 4th section provides that there must not be a cesser of enjoyment at the end of the period, but that it must be proved; for it says, that the period must be "next before" the action, and the 6th section seems intended to provide that there shall be no presumption as to the commencement of the period. Formerly

you presumed antecedent enjoyment; now that is not to be done. But the statute says nothing as to intermediate user, and it must be for the jury to say whether such user has been had. The jury must be satisfied that the claimant enjoyed his right when he chose. It is said that if a cesser for two years does not vitiate the claim, neither will a cesser for seven years. I am not prepared to deny this. A man may have no occasion to exercise his right for seven years, is he therefore to lose it? The cesser for so long a period may be very good evidence, unless it is explained, that a party had not the right claimed and knew he had it not, but that is another matter. I think the 6th section applies to exclude the presumption of antecedent enjoyment only.

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WILLIAMS J.—I am of the same opinion. “Interruption” means “obstruction,” and not any interval of time. It means some overt act indicating that the right is disputed. Before the statute, it was very usual to explain non-user of common by shewing that, at the time of such non-user, the claimant had no commonable cattle. A non-user under these circumstances was never considered fatal.

D.

Rule discharged.

DOE, on the several demises of HARRIET PARSLEY and of  
 SAMUEL PARSLEY and HARRIET PARSLEY, v. DAY.

Saturday,  
 June 25th.

THIS action was tried before *Wightman J.* at the Somersetshire spring assizes. The plaintiff claimed under *Harriet* mortgagee in fee, and demised to him certain other premises for years, provided that, if *A.* the mortgagor should pay the mortgage money on the 5th October next, the deed should be void; but, if the mortgagor should not then pay, it should be lawful for the mortgagee, after giving one month's notice, as after mentioned, to enter, and, whether in or out of possession, to lease, and sell. Covenant by mortgagee not to sell or lease until he had given one month's notice demanding payment and the mortgagor should have made default.

By indenture of mortgage *A.* released premises to the

*Held* that, inasmuch as after the 5th October, the time, if any, during which the mortgagor was to hold, was uncertain, and there was no affirmative covenant that he should hold at all, this was a covenant only, and not a redemise to the mortgagor, and that on default by the mortgagor the mortgagee might, after that day, bring ejectment against him without notice.



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Dawe, to whom the premises had been mortgaged by the defendant by indenture of the 5th April, 1837. The deed recited that the defendant was seised in fee of certain lands, and was possessed of a term in certain other lands, and granted and conveyed to *H. Dawe* the fee in the first-mentioned lands, and the term in the other lands, upon the trusts thereafter mentioned. The deed contained a proviso, that if the defendant should pay *Dawe* the amount of the mortgage money with interest on the 5th October, 1837, the deed should be void, but that if default should be made in paying the same, "then it shall be lawful for the said *H. Dawe*, her heirs, executors, administrators and assigns, after giving one month's notice as hereinafter mentioned, without any further concurrence of the said *G. Day*, his heirs, executors, administrators and assigns, to enter into possession of the mortgaged premises, and whether in or out of possession of the same, to make any leases thereof, and also of her own authority to make sale thereof; *H. Dawe* to stand possessed of the rents and profits, and of the proceeds of the sale, in trust, after deducting expenses, to retain the amount of the mortgage money with interest, and then in trust for the defendant.

The deed contained a covenant on the part of *H. Dawe* not to sell until after she should have given one month's notice to the defendant demanding payment of the mortgage money, and the defendant should have made default.

The action had been brought without notice. Verdict for the plaintiff with leave to move to enter a nonsuit, on the ground that the action could not be brought without notice.

Kelly in Easter term, 1841, obtained a rule nisi accordingly.

Erle and *Butt* shewed cause (a).

Kelly and *Ball* contrà.

Cur. adv. vult.

(a) In Easter term, 1842, May 2 and 3, before Lord Denman C. J., *Patterson*, *Williams* and *Wightman* Js.

Lord DENMAN C. J. now delivered the judgment of the Court as follows :—This was an action of ejectment by a mortgagee against a mortgagor. The mortgage deed was dated April, 1837, and contained a conveyance of the fee in certain premises, and a grant of a term of 99 years, if three persons should so long live, in certain other premises which were recited to be held by the mortgagor for the lives of those persons. There was a proviso that, if the money were paid in October then next, the deed should be void; and, if not, that it should be lawful for the mortgagee on giving one month's notice as thereafter mentioned, to enter and sell, and to lease, whether in or out of possession. There was then a covenant, that *no sale or lease* of the premises should be made until after one month's notice to pay the principal and interest.

The defendant contended at the trial that he was entitled to a notice to quit, or at all events to a demand of possession, upon the ground that the deed amounted to a redemise from the mortgagee to him. A verdict was taken for the plaintiff, with liberty to the defendant to move for a nonsuit. A rule nisi was accordingly granted, which has been argued before us.

For the defendant the cases of *Wilkinson v. Hall* (a), *Doe d. Lyster v. Goldwin* (b), and *Wheeler v. Montefiore* (c), and *Bac. Abr. tit. Leases* (K) (d), were chiefly relied on.

The passage in *Bacon's Abridgment* is this :—"That whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for *such a determinate time*, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose."

Upon the authority of that passage, the Court of Com-

(a) 3 Bing. N. C. 508.

(b) 1 G. & D. 463.

(c) 1 G. & D. 493.

(d) Vol. iv. p. 816, (7th ed.).

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mon Pleas held, in the case of *Wilkinson v. Hall* (a), that there was a demise by the mortgagee to the mortgagor for seven years, determinable by non-payment of interest in the meantime. There the mortgage deed bore date the 5th December, 1833; the proviso for redemption was on payment of 13,000*l.* on the 5th of June then next. There was then a covenant by the mortgagee not to call in the principal money until 5th of December, 1840, if interest were regularly paid in the meantime; and a proviso, that the mortgagors should peaceably hold until default made in payment of the said sum of 13,000*l.*, or the interest thereof according to the aforesaid provisos and agreements. A passage in *Sheppard's Touchstone*, 272 (b), of Mr. Preston's edition, was not brought to the notice of the Court upon that occasion. It agrees in substance with that from *Bacon's Abridgment*, and is as follows:—"If *A.* do but grant and covenant with *B.* that *B.* shall enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if *A.* promise to *B.* to suffer him to enjoy such a piece of land for twenty years; this is a good lease for twenty years. So if *A.* license *B.* to enjoy such a piece of land for twenty years; this is a good lease for twenty years. And therefore it is the common course, if a man make a feoffment in fee, or other estate, upon condition, that if such a thing be, or be not done at such a time, that the feoffor, &c. shall re-enter, to the end that in this case the feoffor, &c. may have the land and continue in possession until that time, to make a covenant that he shall hold and take the profits of the land until that time; and this covenant in this case will make a good lease for that time, if the *uncertainty of the time* (whereunto care must be had) do not make it void." [Mr. Preston adds, "The limitation of a certain term, with a collateral determination on the event, would meet the difficulties of the case."] "And, therefore, if *A.* bargain and sell his land to *B.*, on condition to re-enter if he pay him 100*l.* and *B.* doth covenant with *A.* that he will not take

(a) 3 Bing. N. C. 508.

(b) Vol. ii.

the profits until default of payment, or that *A.* shall take the profits until default of payment; in this case, howbeit this may be a good covenant, yet it is no good lease, [for want," says Mr. *Preston*, " of a more formal contract, and also for want of certainty of time.] And if the mortgagee covenant with the mortgagor that he will not take the profits of the land until the day of payment of the money; in this case albeit the time be certain, yet this is no good lease, but a covenant only, [since," says Mr. *Preston*, " the words are negative only, and not affirmative."] Precisely the same law is laid down in *Powseley v. Blackman* (a), *Evans v. Thomas* (b), and *Jemmot v. Cooley* (c). Now, applying this doctrine to the mortgage in question, nothing can be clearer than that, after the day of payment, viz. in October, 1897, the time, if any, during which the mortgagor was to hold was not determinate, but altogether uncertain, neither was there any affirmative covenant whatever that he should hold at all. The covenant, therefore, that the mortgagee should not *sell* or *lease*, or, even if it be construed should not *enter* until a month's notice, was a covenant only, and no lease. The recent case in the Court of Exchequer of *Doe d. Roylance v. Lightfoot* (d) is entirely in accordance with the view of the law which we now take.

We were, however, pressed with the case of *Doe d. Lyster v. Goldwin* (e). In that case the trust of the deed was, to permit the mortgagor to receive the rents and profits until default in payment of the money. The premises were in possession of a tenant from year to year at the time of the mortgage, to whom the mortgagor afterwards gave a notice to quit in his own name; and the question was whether that notice was good. The Court held, upon the authority of *Wilkinson v. Hall* (f), that the deed operated as a re-demise by the mortgagee to the mortgagor, and that the notice was for that reason good. It may be question-

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*Doe*  
*v.*  
*Parsley*  
*v.*  
*Day.*

(a) Cro. Jac. 659.

(b) Cro. Jac. 172.

(c) 1 Lev. 170; S. C. 1 Saund.

(d) 8 M. & W. 559.

(e) 1 G. & D. 463.

(f) 3 Bing. N. C. 508.

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tionable whether sufficient attention was paid in that case to the point as to the certainty of the time; at all events it was not decided upon any ground that such certainty was immaterial.

The case of *Wheeler v. Montefiore*^(a) was also very much pressed. That was a mortgage deed by way of lease for years (as is the case here with respect to a part of the premises), and also an assignment of personal property as a security. The action was trespass for breaking and entering plaintiff's house and taking his goods against a wrong doer, as far as the pleadings disclosed; for the defendant did not justify under, or in respect of process against, the mortgagor. The plaintiff had never entered or taken possession either of the house or goods; and the true ground of the decision was, that a lessee for years before entry can not maintain trespass; and, as to the goods, that by the deed the plaintiff was not to have possession till the day of payment, which *had* not arrived. Some expressions are used in the judgment as to the construction of the deed; but the real ground of the decision was as above stated.

In the present case, the action is not trespass, but ejectment: and as the mortgagee, before entry into the leasehold part of the premises, had an *interesse termini*, which was sufficient (*Sheppard's Touchstone*, p. 269, Co. Litt. 46, b.) to enable him to demise to *John Doe*, whose entry is admitted, any technical difficulty as to trespass not lying is avoided; and, with respect to the freehold part of the property, none ever existed.

Under these circumstances, we are of opinion that there was no re-demise to the mortgagor, so as to entitle him to notice or demand of possession; but that he was in precisely the same situation that mortgagors usually are, namely, liable to be treated as a trespasser at the option of the mortgagee.

And this rule for a nonsuit must be discharged.

D.

Rule discharged.

(a) 1 G. & D. 493.

1842.

May 31st,
June 24th.

BRYDGES, Bart. v. LEWIS.

ASSUMPSIT. The declaration stated that the defendant had become tenant to the plaintiff of a farm on certain terms set forth (to pay rent, to repair buildings, not to sell timber, to spread manure on land, &c.) and in consideration thereof promised to perform those terms. The declaration then alleged several breaches.

The defendant pleaded that he did not become tenant on those terms, and traversed the breaches.

At the trial before *Gurney B.* at the Hereford Spring Assises, 1841, the plaintiff gave in evidence a lease in writing, but not under seal, for seven years from the 25th March, 1836, containing the terms stated in the declaration. This lease bore date February 23, 1835, and was made between *Benjamin Hawkins*, agent for *Ann Hawkins*, and *William Holstein* and *Ann* his wife of the one part, and the defendant of the other. There were also in evidence indentures of lease and release, dated 14th and 15th January, 1839, whereby *Ann Hawkins*, widow, and *Ann Holstein*, widow, conveyed the premises to the plaintiff in fee; also a notice of the 28th January, 1839, from the plaintiff to the defendant of such conveyance. On the part of the defendant it was objected that the 32 *Hen.* 8, c. 34, which gives to an assignee of the reversion of a lease a right of action for a breach in his time of covenants in it, applies only to cases of leases by deed. The learned judge refused to stop the case, but reserved leave to the defendant to move to

The lessor of a term of years created by writing not under seal, containing a particular contract of tenancy, conveyed the freehold to the plaintiff. The defendant afterwards and during the term paid rent to the plaintiff, and otherwise admitted him to be his landlord on the terms of the original demise. In an action of assumpsit in which the plaintiff declared as on an original demise by him to the defendant on the terms on which the defendant first became lessee, the defendant traversed that he held of the plaintiff on those terms.

Held, though the term of years first created was still unexpired, that there was on this issue evidence for the jury in support of the demise stated in the declaration, and that on their verdict of such a demise the plaintiff had a right of action for the non-observance of such particular contract of tenancy.

Quere, whether the plaintiff could have recovered if the defendant had pleaded non-assumpsit.

The defendant had formerly pleaded non-assumpsit as well as non tennit. A judge at chambers had ordered one of these pleas to be struck out, giving the defendant the election to retain either of them.

Semble, both pleas ought to have been allowed, but the Court refused on that ground to grant a new trial, with liberty to plead de novo, the defendant having retained non tennit instead of non assumpsit, which would have raised the intended defence.

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enter a nonsuit. The case proceeded, and the plaintiff gave evidence (payment of rent and admissions) to shew that the defendant held of him on the terms stated. It did not appear that the defendant had been in actual occupation of the premises, but a person named *Davis* had, whose occupation the plaintiff contended was the defendant's occupation. The jury gave a verdict for the plaintiff on the question left to them, whether the defendant held of the plaintiff on those terms.

A rule nisi having in the term following been granted on the above objection,

Whateley and *Whitmore* shewed cause (a). The 32 *Hen.* 8, c. 34, has always received the largest and most liberal construction in favour of the assignee of a reversion. *Glover v. Cope* (b), *Selwyn's N. P. Covenant*, IV. p. 484, *Lincoln College* case (c). [On this point the Court gave no judgment.]

The verdict must be sustained, independently of the construction of the statute, upon the evidence given of a recognition by the defendant of the terms of the tenancy. By the stat. 4 & 5 *Ann.* c. 16, s. 9, after notice of the change of title, he became tenant without a formal attornment. By the operation of that statute a tenant of a vendor, after notice, becomes tenant of the vendee. In *Buckworth v. Simpson* (d) there had been a change of parties to the demise, and it was held that a person in whom the title had become vested after the commencement of the tenancy might maintain an action of *assumpsit* for the non-fulfilment of the terms of the original demise against a person who came into possession under the original lessee and retained it. [*Patteson J.* That case was founded on the absence of a notice to quit by the new owner of the freehold.] This was undoubtedly one of the circumstances from which the contract was inferred, but here there is other evidence at

(a) On Monday, April 25th, before Lord Denman C. J., *Patteson, Williams and Wightman Js.*

(b) 3 *Lev.* 396.

(c) 3 *Co.* 63.

(d) 1 *Cr. M. & R.* 834.

least equivalent to it. *Purke B.* particularly pointed out the serious inconveniences which would arise if under such circumstances an action could be maintained only by the original lessor or his personal representatives.

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R. V. Richards in support of the rule. The stat. 32 Hen. 8, c. 34, is undoubtedly confined to leases under seal. That is shewn by the recital in conjunction with the enactment, both speaking only of "leases and grants of land for life or lives, or for term of years by writing under seal," and of "indenture of leases or grants." The statute of *Anne* has never been held to have the effect of assigning a special contract of demise. The declaration does not state a right of action founded on a demise by the original lessor vested by assignment of the reversion in the plaintiff.

But, if there is no assignment of the contract, as there cannot be except by the operation of that statute, the right of action fails altogether. That right can then arise only by force of some new demise, and a recognition of the terms of the old demise is so far from being evidence of a new demise that it negatives it. Unlike the case of *Buckworth v. Simpson* (a) the demise was for a fixed term, which the new tenant of the freehold had no power to determine. That term must be destroyed before a fresh demise of the same land could be made. But there was no surrender to the representatives of the original lessor, nor was there any consideration to support a new promise by the defendant. He received no right from the plaintiff that he had not before, nor indeed could he have maintained any action against the plaintiff, who was not in any way bound.

Cur. adv. vult.

Lord DENMAN (b) delivered the judgment of the Court. This was an action of assumpsit in which the plaintiff de-

(a) 1 Cr. M. & R. 834.

(b) On Tuesday, May 31st.

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clared that the defendant had become tenant to him upon certain terms (stating them), and in consideration thereof promised to perform those terms. The declaration then alleged several breaches.


The defendant pleaded 1st. That he did not become tenant to the plaintiff upon the terms stated, and other pleas traversing the breaches.

The plaintiff put in a lease for seven years from 25th March, 1836, not under seal, containing the terms stated in the declaration dated February 23, 1835, and made between *Benjamin Hawkins*, agent for *Ann Hawkins* and *William Holstein* and *Ann* his wife, of the one part, and the defendant of the other part. Also indentures of lease and release dated 14 and 15th January, 1839, whereby *Ann Hawkins*, widow, and *Ann Holstein*, widow, conveyed the premises to the plaintiff in fee. Also a notice of the 28th January, 1839, from the plaintiff to the defendant of such conveyance. Hereupon the learned judge was asked to nonsuit upon the ground that the action should have been in the names of the original lessors.

The learned judge refused, but reserved leave to move for a nonsuit. The case proceeded, and the jury found for the plaintiff on the issue as to the tenancy, and on some of the breaches, but on other breaches for the defendant. A rule nisi to enter a nonsuit was obtained and has been argued. There is no doubt but that the defendant by the conveyance in January, 1839, and by the operation of the statute 4 & 5 Ann. c. 16, s. 9, became tenant to the plaintiff without any formal attornment. Nor can it be doubted that he was tenant upon the terms contained in the lease under which he entered.

The first issue was therefore proved in point of fact. There is no plea of non-assumpsit nor any other plea which raises any question as to the existence of a contract between the plaintiff and the defendant. Therefore without giving any opinion as to the construction of the statute 32

Hen. 8, c. 34, or any point of law at all, we must say that this rule for entering a nonsuit must be discharged.

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 v.
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Rule discharged.

A rule was afterwards obtained to shew cause why there should not be a new trial, with liberty to add a plea of non-assumpsit. This rule was obtained on the ground that the defendant had originally pleaded that plea in conjunction with the plea denying the tenancy, and that by an order of a judge at chambers the defendant had been put to his election to retain one of the pleas only, the learned judge being of opinion that those pleas were a violation of the rule prohibiting two pleas founded on the same subject-matter and varying in circumstances only. In support of the rule it was now urged that, according to the above judgment, both pleas ought to have been allowed, as raising different defences.

Sir *W. W. Follett* S. G., *Whaleley* and *Whitmore* shewed cause (a).

R. V. Richards and *Gray* supported the rule.

Cur. adv. vult.

Lord DENMAN C. J. (June 24th) delivered the judgment of the Court.—In this case the defendant proposed originally to plead non-assumpsit, and also a plea denying that he became tenant to the plaintiff on the terms alleged in the declaration. The judge at chambers considered that the two pleas raised the same issue and refused to allow them both. In general they would raise the same issue, for the promise is but a legal consequence resulting from

(a) Monday, June 13th, before Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js.

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the tenancy ; but in this peculiar case of a demise by lease in writing, not under seal, for a term of years, made by a former owner of the fee, who has conveyed his interest to the plaintiff during that term of years, though it be clear that the tenant becomes by such conveyance tenant to the plaintiff on the terms of the lease, yet it is very questionable whether any promise in law results therefrom, or whether any promise in fact would have a sufficient consideration to sustain it ; the issues therefore were clearly different, and both pleas ought to have been allowed. It does not appear whether the peculiar circumstances of the case were mentioned to the judge, and the defendant had the choice of pleading which plea he liked. Doubtless the plea of non-assumpsit would have raised the real question, and the only question in the case ; for the other plea denied what was really true and what the defendant must have known to be true, and, as the defendant might have pleaded non-assumpsit, he was not shut out from any real defence which he had by the judge's refusal to allow both pleas, but by his own mistake in pleading as he did. Whether he would by adopting the plea of non-assumpsit have been shut out from denying the tenancy it is not material to consider, for it is plain that he could not, and did not deny it with success.

Under these circumstances we think that we cannot, according to the practice of the Court, interfere to correct the defendant's own mistake, especially as the defence sought to be set up is merely a technical one wholly beside the merits of the case.

G.

Rule discharged.

1842.

HARRISON v. ELVIN and others (a).

TRESPASS for entering the plaintiff's close and taking his goods.

Plea: not guilty (by statute). Issue thereon.

At the trial before *Tindal* C. J. at the last Norfolk assizes, it appeared that the trespass in question was justified by the defendants as a distress for rent. The defendants claimed by devise from the landlord. The will purported to have been attested by two witnesses, whose names were subscribed to it. The attesting witness, who was called to prove its execution, stated that he himself could neither write nor read, that he was requested by the testator to attest the will, and that the other attesting witness had guided his hand, with his consent, in writing his name. The witness however identified his name as the name so written.

A person who could neither write nor read, being called upon to attest a will, had his hand guided, and so subscribed his name to the will:—*Held*, that the will was properly subscribed, within the 7 *Will.* 4 and 1 *Vict.* c. 26.

It was objected that this was not a proper attestation and subscription of the will by the witness, within stat. 7 *Will.* 4 and 1 *Vict.* c. 26, s. 9. The chief justice overruled the objection. Verdict for the defendants, with leave to move to enter the verdict for the plaintiff.

Biggs Andrews, in the Easter term following, moved accordingly (b). The statute directs that the witness "shall attest and shall subscribe the will." The act of subscription in this case was not the act of the witness, but of the person who guided his hand. The witness himself was as much an instrument as the pen in his hand. The name could not be in the handwriting of a person who was unable to write. Suppose the witness to be dead, it might be necessary to establish the will by proving his signature; but how could this signature ever be proved as the signature of the witness? The witness should have

(a) Decided in Easter term last (May 4).

(b) April 21, before Lord Denman C. J., *Patteson*, *Williams* and *Wightman* Js.

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HARRISON
v.
ELVIN.

put his mark, and then the subscription would have been sufficient. Here there is less than his mark, for there is really nothing of the witness's appearing on the will. The section authorises somebody else to sign for the testator by his direction, but there is no provision enabling one witness to sign for another.

Cur. adv. vult.

Lord DENMAN C. J. delivered the judgment of the Court.—Several difficulties worthy of consideration were suggested as to the authentication of the will in this case by the signature of an attesting witness who was unable to write. But we think that inconveniences of this kind are inseparable from all modes of attestation, and that the witness must be taken to have subscribed his name within the meaning of the statute.

D.

Rule refused.

SAMUEL v. NETTLESHIP (a).

A prisoner in the debtor's prison for London and Middlesex, (not being in custody at the suit of the plaintiff,) petitioned the Insolvent Court, and inserted the plaintiff among others

KELLY, on a former day in this term, obtained a rule, calling upon the defendant to shew cause why the writ of habeas corpus issued in this cause should not be quashed or set aside, and why the defendant should not be recommitted to the custody of the keeper of the debtor's prison for London and Middlesex, in the city of London.

(a) Decided in Easter term last (May 9).

as creditor in his schedule. He afterwards obtained his discharge and the benefit of the act, as to all his creditors except the plaintiff, and he was to be entitled to his discharge and the benefit of the act as to the plaintiff's debt so soon as he should have been in custody at his suit, within the walls, and not within the rules of the prison, for seven months.

On the following day, while the insolvent was still in the same custody, the plaintiff sued out of the Queen's Bench a *capias ad respondendum* against him, which was lodged with the sheriff of Middlesex, who thereupon detained the defendant at the plaintiff's suit.

Held, that notwithstanding the adjudication of the Insolvent Court under 1 & 2 Vict. c. 110, the prisoner had the same right as before the statute of removing himself by habeas corpus ad fac. et recip. into the custody of the marshal of the Queen's Bench.

The defendant had been arrested on the 5th January last, at the suit of one *T. S.*, and committed to the custody of the keeper of the debtor's prison for London and Middlesex, in the city of London. On the following day the defendant filed his petition to the Insolvent Court. On the 17th January a vesting order was made. On the 21st January he filed his schedule, in which the name of the plaintiff, among others, was inserted as a creditor. On the 11th March the Insolvent Court ordered that the defendant be discharged out of custody, and entitled to the benefit of the act forthwith, as to all the creditors of the defendant named in his schedule, excepting the plaintiff. As to the plaintiff's debt, that Court adjudged that, inasmuch as it had been contracted fraudulently, the defendant should be discharged from custody, and entitled to the benefit of the act, as soon as he should have been in custody at the suit of the plaintiff for the same debt for seven calendar months, to be computed from the time of making the vesting order above mentioned. It was farther directed by the Insolvent Court that the defendant should be confined within the walls of the said prison, and not within its rules or liberties.

On the following day, whilst the defendant was a prisoner in the actual custody of the keeper of the debtor's prison for London and Middlesex, the plaintiff sued out of the Court of Queen's Bench a writ of *capias ad respondendum* against the defendant. The same day the writ was lodged with the sheriff of Middlesex, who thereupon detained the defendant at the plaintiff's suit in the said prison.

On the 18th March, the defendant caused a writ of *habeas corpus* to be issued out of this Court, to remove himself from the custody of the sheriff to the custody of the marshal of the Queen's Bench prison. He was removed accordingly, and committed to the Queen's Bench prison, where he remained in custody at the suit of the plaintiff.

Erle shewed cause. A prisoner, against whom, while in the custody of any other prison than that of the Queen's

1842.

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Bench, process issues from this Court, has the right of removing himself by habeas corpus to the custody of the marshal. The insolvent clauses of the 1 & 2 Vict. c. 110, have not altered the practice. The 85th section merely enables a creditor, with respect to whose debt the insolvent is not to be discharged until some future period, to arrest or detain him at any time before such period arrives, "in the same manner as he would have been subject and liable thereto, if this act had not passed."

Kelly contra. Unless the habeas corpus in this case can be set aside, the powers of the Insolvent Court to punish a fraudulent debtor will be completely nullified. By the 81st section of the statute 1 & 2 Vict. the Insolvent Court may direct the prisoner to be confined within the walls of the prison, and the Insolvent Court had so directed in this very case. But, if the defendant is entitled to remove himself by habeas, he may elude this part of his sentence and enjoy the rules of the Queen's Bench prison, or indeed he may give bail to the plaintiff's writ as if he had been arrested in the ordinary way. [*Patteson* J. I do not see any thing in the act to prevent his giving bail.]

PATTESON J.—I am not prepared to say what the intention of the legislature may have been on this subject. The defendant was discharged by the Insolvent Debtors' Court as to the plaintiff's debt, so soon as he, the defendant, should have been in custody at the suit of the plaintiff for seven months. The 85th section provides, that whenever it has been adjudged that a prisoner shall be discharged at a future period, "such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, *in the same manner as* he would have been subject and liable thereto *if this act had not passed*; provided nevertheless, that, when such

period shall have arrived, such prisoner shall be entitled to the benefit and protection of this act, notwithstanding that he may have been out of actual custody during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time or any part thereof." Now if this act had not passed, all the plaintiff could have done would have been to sue out a *capias ad respondendum* to hold the defendant to bail, and then to go on and get his judgment and sue out a *capias ad satisfaciendum*. That he may still do. He may get his *capias ad satisfaciendum*, and then the defendant cannot get out of prison until the seven months have expired. The plaintiff may still effect all this, but in order to effect it he must go on to execution.

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WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule discharged.

The QUEEN v. The GREAT WESTERN RAILWAY
 COMPANY (a).

TALBOT in Easter term last obtained a rule to shew cause why an inquisition, taken before Mr. *Blandy*, one of the coroners for the borough of Reading, on the 31st December last, on view of the body of *Richard Woolley*, then and there lying dead, should not be quashed.

The inquisition was as follows:—

"Borough of Reading, to wit. An inquisition indented, taken for, &c. at the Royal Berkshire Hospital, in the parish of St. Giles, in the said borough of Reading, and from

(a) Decided during the term (May 28).

in the county where the death happens, does not apply to deaths arising from *accidental* injury.

2. Nor *semble* where death ensues in a *borough* from a felonious injury inflicted out of the borough.

3. Where death ensues in a borough from an accidental injury inflicted out of the borough, the borough coroner has no jurisdiction to take an inquisition either by common law or statute. (But see now the stat. 6 Vict. c. 12 (11th April, 1843).)

1. The stat. 2 & 3 Edw. 6, c. 24, which enacts that where a mortal wound is given *feloniously* in one county and death ensues from it in another county a coroner shall have jurisdiction to take the inquisition

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thence continued by adjournment to the public office in the parish of St. Lawrence, in the said borough, on the 31st day of December, in the fifth year of the reign &c. before *John Jackson Blandy*, Esq. one of the coroners of our said Lady the Queen for the said borough, on view of the body of *Richard Woolley*, now in the parish of St. Giles, in the borough aforesaid, lying dead, upon the oaths of, &c. the several persons whose names are hereunder written and seals affixed, good and lawful men of the said borough, duly chosen, and who being then and there duly sworn and charged to inquire for our said Lady the Queen, when, how, and by what means the said *Richard Woolley* came to his death, do upon their oaths say that the said *Richard Woolley*, on the 24th day of December in the year aforesaid, at the parish of Sunning, in the county of Berks, then and there being in a certain carriage then and there attached to a certain engine then and there drawing the same, it so happened that the said *Richard Woolley* was then and there casually, accidentally, and by misfortune overturned and violently thrown out of the said carriage to and against the ground, by means whereof the said *Richard Woolley* did then and there receive one mortal fracture in and upon the hinder part of the head of him the said *Richard Woolley*, of which said mortal fracture the said *Richard Woolley*, from the said 24th day of December in the year aforesaid until the 29th day of December in the same year, at the same parish and county last aforesaid, and also at the parish of St. Giles, in the said borough of Reading, to wit, in a certain hospital there called the Royal Berkshire Hospital, did languish, and languishing did live, on which said 29th day of December, in the year aforesaid, in the hospital aforesaid, at the parish last aforesaid, in the borough aforesaid, the said *Richard Woolley* of the mortal fracture aforesaid did die. And so the jurors aforesaid upon their oaths aforesaid do say, that the said *Richard Woolley*, in manner and by the means aforesaid, accidentally, casually, and by misfortune came to his death, and

not otherwise; and that the said carriage and engine were moving to the death of the said *Richard Woolley*, and are of the value of 100*l.*, and are the goods and chattels, and in the possession of the Great Western Railway Company. In witness whereof, &c. &c."

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Waddington shewed cause (*a*).

Kelly supported the rule.

Besides the authorities mentioned in the judgment of the Court as to the principal objection (*b*) to the inquisition, the following authorities were referred to in the course of the argument: *Reg. v. Grand Junction Railway Company* (*c*), *Rex v. Evett* (*d*), and *Reg. v. Clerk* (*e*), stat. 33 Hen. 8, c. 12; 2 Inst. 550. *Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court as follows:—The first and principal objection to this inquisition is, that it appears to be taken before the coroner of the borough of Reading, upon the view of a body lying dead within that borough, and upon the oaths of men of that borough; but upon the face of the inquisition itself it is found that the accident which occasioned the death occurred in the parish of Sonning, in the county of Berks (not saying within the borough of Reading), yet the jury have found the cause of the death, and that a certain carriage and engine were moving to the death, and have found their value to be 100*l.*

For the Company it is urged that on the face of the inquisition a want of jurisdiction appears.

For the crown it is contended that there is no such want; and that on two grounds:—

(*a*) The case was argued in the deodand were insufficiently stated.

(*c*) 11 A. & E. 128; S. C. 3 P. & D. 57.

(*d*) 6 B. & C. 247; S. C. 9 D. & R. 237.

(*e*) 1 Salk. 377.

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First, That at common law the coroner of the place where a dead body is lying has jurisdiction to inquire into the death and the cause of it, though both the one and the other should have happened out of his jurisdiction. Secondly, That at all events such jurisdiction is given by the stat. 4 *Edw.* 1, De Officio Coronatoris, stat. 2, and 2 & 3 *Edw.* 6, c. 24.

It may be convenient to examine the second ground in the first place. The statute 4 *Edw.* 1 is said by Serjeant *Hawkins*, Bk. ii. c. 9, s. 22, to be wholly directory, and in affirmation of the common law. It contains no provision whatever respecting the jurisdiction of the coroner as regards place, nor any expression which can be construed into an extension of his power. The stat. 2 & 3 *Edw.* 6, c. 24, s. 2, does expressly provide, "that where any person shall be *feloniously stricken* or poisoned in one county and die of the same stroke or poisoning in another county, an indictment thereof, found by jurors of the county where the death shall happen (whether before the coroner upon the sight of such dead body, or before the justices of the peace or other justices or commissioners which shall have authority to inquire of such *offences*), shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founded."

The statute then contains similar provisions respecting appeals of murder, and the trial of accessories, as well in murder as other felonies. The words of the second section are confined to cases of *felonious* killing, and the preamble of the act, and all the other sections in it, plainly shew that the mischief intended to be remedied was the escape of felons from want of jurisdiction and nothing else. But it is said, that as the jury must determine whether there has been a felonious killing, and, as in all cases of violent death such felonious killing may exist, the statute incidentally gives power to the coroner to pursue an inquiry into the cause of death in all cases where he has once begun it. This argument justly applies where there

is any suspicion and charge of felony before the coroner, upon which the jury would have to exercise their judgment; but it is observable, that the act of parliament seems to assume the existence of the felony, for it makes good an indictment found for felonious striking or poisoning, but is silent entirely as to what is to be done by coroner or jury, if no such indictment be found. The effect of any other finding seems to be left entirely as it stood at common law.

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It is further objected that the statute 2 & 3 *Edw.* 6, speaks only of counties, and that however it may empower the coroner of the *county* in which a dead body lies to inquire into the cause of death arising in another county, it does not empower the coroner of a *borough* or other limited jurisdiction so to do.

In support of this objection, the case of *Rex v. Welsh* (a) is cited, where the judges held that the stat. 7 *Geo.* 4, c. 64, s. 12, giving jurisdiction in cases of offences committed within 500 yards of the border of a county, does not extend to offences committed within 500 yards of a borough. The language of the two acts is very similar in the use of the word "county," and we see no reason for putting a different sense upon it in this case from that which the judges adopted in the case cited. For this reason, therefore, as well as the other above mentioned we think that the statute 2 & 3 *Edw.* 6 does not apply.

It remains to consider what jurisdiction the coroner has at common law. It is laid down in *Hale's P. C.* vol. i. p. 426, "At common law if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted where the stroke was given, for the death is but a consequent and might be found in another county," (and he cites 9 *Edw.* 4, c. 48, and 7 *Hen.* 7, c. 8,) "and if the party died in another county, the body was removed into the county where the stroke was

(a) 1 Moo. C. C. 175.

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given, for the coroner to take an inquisition *super visum corporis*, 6 *Hen. 7*, c. 10, but now by stat. 2 & 3 *Edw. 6*, c. 24. the justices or coroner of the county where the party died shall inquire and proceed as if the stroke had been in the same county where the party died."

Again, in vol. ii. p. 66, it is said, "And, therefore, in ancient times, if a man were hurt in the county of A. and died in the county of B., the coroner of the county of B. could not take an inquisition of his death, because the stroke was not given in that county, nor could the coroner of the county of A. take an inquisition, because the body was in the county of B., but they used to remove the body into the county of A.," and there the coroner of that county was to take the inquisition, and he cites 6 *Hen. 7*, c. 10, *a*, as before. Again, the stat. 2 & 3 *Edw. 6*, in the preamble distinctly states, that in such case "it hath not been founden, by the laws and customs of this realm, that any sufficient indictment thereof can be taken in any of the said two counties, for that by the custom of this realm the jurors of the county where such party died of such stroke can take no knowledge of the said stroke, being in a foreign county, although the same two counties and places adjoin very near together, nor the jurors of the county where the stroke was given cannot take knowledge of the death in another county, although such death most apparently come of the stroke." The same law is laid down very pointedly in *Hale's Pleas of the Crown*, 426, as to the jurisdiction of the Admiralty and common law in such cases. "If a mortal stroke be given on the high sea and the party comes to land in England and die, the admiral shall not have jurisdiction in this case to try the felon, because the death that consummated the felony happened upon the land, nor the common law shall not try him, because the stroke that made the offence was not *infra corpus comitatûs*." And he cites 5 *Rep.* 106, b, Sir *Harry Constable's* case; and 2 *Rep.* 93, a, *Bingham's* case; and *Lacie's* case, 25 *Eliz.* cited in the latter case.

After these authorities it is startling to hear it asserted

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broadly at the bar, that if a mortal stroke be given in county A. and the party go to and die in county B. and the body after death be taken into county C., the coroner of county C. may hold an inquest and inquire into the whole matter, and that by the common law. No authority is cited for such assertion, and in truth there is no foundation for it.

The mere fact of a body lying dead does not give the coroner jurisdiction, nor even the circumstance that the death was sudden; there ought to be a reasonable suspicion that the party came to his death by violent or unnatural means; 1 *East's Pleas of the Crown*, 382, citing three MS. cases; and see also *Rex v. Justices of Kent (a)*, and, *Nolan*, 141, *Rex v. Justices of Norfolk*, which is one of the cases cited in *East's P. C.* The coroner must, therefore, before he summons a jury make some inquiry, and if on that inquiry he finds that the circumstances which occasioned the death happened out of his jurisdiction, and that there is no reasonable suspicion of murder or manslaughter, he ought to abstain from summoning a jury, and the body in order to an inquest must be removed into the county where the circumstances took place.

If, however, the coroner has reason to suspect murder or manslaughter to have been committed, or if it does not appear on inquiry by him that the circumstances occurred out of his jurisdiction, he is bound to summon a jury, and then if in the course of evidence it should appear that the circumstances occurred out of his jurisdiction, and no murder or manslaughter is suspected, the coroner must stop the proceedings and discharge the jury. This is what he would have been obliged to do before the statute 2 & 3 *Edw. 6.* in all cases where such circumstances appeared, and this he must do still unless it be a supposed case of murder or manslaughter, when he must proceed till the jury find their verdict.

If the verdict be death by the visitation of God, nothing more is done; for in truth it appears that there was no

(a) 11 *East*, 229.

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occasion for an inquest. If the verdict be murder or manslaughter, then the want of jurisdiction at common law (if any) is cured by stat. 2 & 3 *Edw.* 6. If the verdict be "per infortunium, then the coroner (that is by the jury) is to inquire of the deodand, and the value, and in whose hands, and is to seize and deliver the same to the township to be answerable for the same to the king by the statute 4 *Edw.* 1, *De Officio Coronatoris*; 2 *Hale's Pleas of the Crown*, 62." But this supposes that the circumstances which occasioned the death happened within his jurisdiction, and that the deodand to be seized is also within it.

If the facts be otherwise, as in this case, then the finding the deodand at all events is merely void. But, as a want of jurisdiction appears on the face of the proceedings, we are of opinion that the whole inquisition is void.

We do not enter into any question as to the validity of the inquisition in other respects, but on the ground of want of jurisdiction, the rule to quash it must be made absolute.

D.

Rule absolute (a).

(a) But see the stat. 6 *Vict.* c. 12, (passed 11th April, 1843,) which now gives the jurisdiction.

Ex parte CLARKE(b).

1. The Court will allow the return to a habeas corpus ad subjiciendum to be amended even after it is filed, and without the consent of the prisoner.

2. Where the return was that the prisoner was committed to custody "upon the following order," and then set out an order purporting to be an order of the Master of the Rolls committing the prisoner for contempt, it was objected that the return did not state that the order was in fact made by the Master of the Rolls:

The Court allowed the return to be amended by striking out the words "the following order," and substituting "by an order of the High Court of Chancery, made by the Right Hon. Henry Lord Langdale, Master of the Rolls, of which the following is a copy."

3. The order stated that the prisoner was brought to the bar of the Court of Chancery and committed for contempt. The Court would not allow the prisoner to use affidavits to shew that he had not been brought to the bar of the Court, and so was entitled to his discharge under 11 *Geo.* 4 and 1 *Will.* 4, c. 36, s. 15, rule 5.

4. This Court takes judicial notice that the Master of the Rolls is a judge of the Court of Chancery.

PASHLEY obtained a rule for a writ of habeas corpus to bring up the applicant *William Saint Thomas Clarke*, a

(b) This case was decided in Hil. T. last, (Jan. 17.)

prisoner in the custody of the warden of the Fleet Prison, to the bar of this court, with the cause of his being detained &c.

The affidavits on which the rule was obtained contained the following statements.

The prisoner, who was defendant in a chancery suit in which *John Clarke* and others were plaintiffs, had been taken at Lincoln on the 13th of October last by a commissioner of rebellion, under a commission of rebellion issued for that purpose by the plaintiffs, for not putting in his answer in the said suit, and brought to London. On the 15th October he was taken before Lord *Langdale* M. R. at his private residence in Grosvenor Street, Hanover Square. Lord *Langdale* examined the prisoner in the presence of the counsel and solicitors of the plaintiffs as to the causes of his not having put in his answer, and directed that he should be transferred from the custody of the commissioner, and delivered to the warden of the Fleet.

The prisoner had remained in the custody of the warden ever since, and had not during the first four days of Michaelmas Term last, or at any other time during the term, been brought by habeas corpus or otherwise to the bar of the Court of Chancery.

On application at the warden's office, it was stated that the following order for the prisoner's detention had been lodged with the warden.

"Master of the Rolls.

Friday, the 15th October, 5 Vict. 1841.

Between *John Clarke* and others, plaintiffs.

William Saint Thomas Clarke, defendant.

The defendant *William Saint Thomas Clarke*, being this day brought to the bar of this Court by virtue of a commission of rebellion, for not putting in his answer to the plaintiff's bill, and the said defendant still persisting in his contempt, it is on the motion of *A. B.* of counsel for the plaintiffs ordered that the said *W. S. T. C.* be turned over to the prison of the Fleet, and that he do remain there until

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he hath fully answered the plaintiffs' bill, cleared his contempt, and this Court make other order to the contrary.

Entered S. S.

F. R. B."

Pashley on moving for the rule referred to 11 *Geo.* 4 and 1 *Will.* 4, c. 36, s. 15, rule 5, which provides, "That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an *habeas corpus to the bar of the Court within thirty days* from the time of his being actually in custody or detained (being already in custody) upon process of contempt, and, if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term: and where the defendant is in custody of the serjeant at arms, or of the messenger, upon an attachment or other process, the plaintiff shall, within ten days after his being taken into such custody, or if the last of such ten days shall happen out of term, then within the first four days of the next ensuing term, cause the defendant to be brought to the bar of the Court; and *in case any such defendant shall not be brought to the bar of the Court* within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant at arms or messenger, in whose custody he shall be, shall *thereupon discharge him* out of custody, without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued," &c. He contended that, as it appeared that the prisoner had been in custody more than thirty days for his contempt, without having been brought to the bar of the Court of Chancery, he was entitled to his discharge.

Jan. 21. The warden of the Fleet brought the prisoner into Court, and made the following return:

"I &c., warden &c., do certify and return, that before the coming of the Queen's writ of *habeas corpus* to me directed

and which is here annexed, to wit, on the 15th October, 1841, *W. S. T. C.*, in said writ named, was committed to my custody *upon the following order*,—"Master of the Rolls," &c. Then followed the order already set out.

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The return having been filed,

Pashley moved for the prisoner's discharge. The return does not state that the order of commitment was made by the Master of the Rolls, but merely that the prisoner was committed upon "the following order." [Lord Denman C. J. The commitment certainly is not shewn to be the act of Lord Langdale. The warden may have one reason or another for supposing that Lord Langdale made the order, but, if he has made up his mind that it was Lord Langdale's order, should he not aver it as a fact?]

Jervis and *Crompton*, (who appeared for the plaintiffs in the Chancery suit.) The return may be amended: *Reg. v. Batcheldor* (a); *Anonymous* (b). [Lord Denman C. J. Perhaps the warden himself may not be willing that his return should be amended. *Wightman J.* referred to *Chambers's Case* (c).]

Jervis then stated that the warden, through him, had applied to amend by striking out the words "the following order," and introducing instead thereof, "by an order of the High Court of Chancery, made by the Right Hon. Henry Lord Langdale, Master of the Rolls, of which the following is a copy."

Pashley contended that such an amendment ought not to be allowed, as the writ had been obtained on the very ground that it was not the Court of Chancery that made the order. The prisoner could shew that the order was not made "at the bar of the Court," as the statute required, and the amendment might perhaps have the effect of shutting out the truth of the very point in dispute.

(a) 1 P. & D. 516. (b) 1 Mod. 102. (c) Cro. Car. 133.

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Lord DENMAN C. J.—I am of opinion that the objection to the return, as it stands at present, is a valid objection. The paper, containing the order stated on the return, may have come from any quarter: nothing else is set out, and there is no averment that it was the Master of the Rolls who made the order. But the warden applies to amend his return. We have clearly power to allow him to amend; the question is whether we ought to allow him to do so. In *Chambers's* case, the Court itself advised the marshal to amend. There is also the anonymous case in 1 Mod.; and the anonymous case in Fortesc. 273 recognises the propriety of allowing returns to be amended in ordinary cases. In the case of *Power v. Jackson (a)*, the Lord Chancellor ordered the return to be amended. Plain common sense also authorises such amendments, and we should be wanting in the discharge of our duty, if we did not allow them. We will allow the amendment proposed in this case. If the warden chooses to say that this order was made by the Court of Chancery he may do so, and he takes upon himself the consequences if the fact is not so.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

D.

Amendment allowed.

The return having been amended,

January 24th. *Pashley* again moved (b) that the prisoner be discharged. The first objection to the amended return is, that it is not stated that the warden ever received any sealed warrant from the Court of Chancery, and it is consistent with the return that the warden was not in the Court of Chancery when the commitment was made. The next objection is founded on the statement that the warden holds the prisoner under an order of the Court of Chancery, made in open

(a) 2 Russ. 583.

before Lord Denman C. J., Patte-

(b) On Monday January 24, son, Coleridge and Wightman Js.

court, which is admitted to be necessary, for none other will authorise a detainer beyond a certain time, 11 Co. 4, and 1 *Will.* 4, c. 36, s. 15, rule 15. By the practice of the Court of Chancery, this order might be made in a private room, and if the facts in the return are doubtful, the prisoner may plead to it.

The return, to be good, must have the greatest certainty, that the Court may see distinctly that the party who is brought up is justly deprived of his liberty. 2 Inst. 52, 86, *Deybel's case* (a), *Leonard Watson's case* (b), *Rex v. Clerk* (c), *Bushell's case* (d), *In re Power* (e). *Burdett v. Abbot* (f), *Case of the Sheriff of Middlesex* (g), *Com. Dig.* Imprisonment, H. 5; Form, 2; *Deacon's Bankrupt Law*, 411; *Dicas v. Lord Brougham* (h). The return does not state that the prisoner when committed to the custody of the warden was in actual custody. [Coleridge J. The expression in the order "turned over," implies that he was in actual custody.] The warden is not bound by what is stated by way of recital, he ought to so state the facts as to pledge himself to the truth, and to be liable to an action if he states them untruly. That was the form of the return in *Rex v. Suddis* (i). In this case there was only a statutory authority, and it ought to be shewn that the case came within it.

2. The time has elapsed during which he might have been detained without an order of commitment of the Court of Chancery, pronounced by the Court upon the prisoner being brought to the bar of the Court; the return ought to show distinctly that the prisoner was so committed. The jurisdiction ought to be distinctly shewn, and it is not. Want

(a) 4 B. & Ald. 243.

S Keble, 322.

(b) 9 A. & E. 775; S. C. *nom.* *Reg. v. Batcheldor*, 1 P. & D. 516.

(e) 2 Russ. 583.

(c) 1 Salk. 349.

(f) 14 East, 1.

(d) 1 Freem. 1; S. C. Sir T.

(g) 11 A. & E. 296; S. C. 3 P. & D. 349.

Jones, 13; Vaugh. 135. On motion for time to plead, 1 Mod. 119;

(h) 6 C. & P. 249.

(i) 1 East, 306.

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of jurisdiction may be shewn by affidavits. The following cases were cited : as to the nature of the process, *Miller v Knox* (a), *Daniell's Ch. Pr.* (b) : as to the defect of jurisdiction and that the want of it might be shewn by affidavits, *Rex v. Justices of Somerset* (c), *Rex v. Justices of North Riding* (d), *Rex v. St. James, Westminster* (e), *Rex v. Great Marlow* (f), *Reg. v. Justices of Cheshire* (g), *Rex v. Justices of Cambridgeshire* (h), *Christie v. Unwin* (i), *Rex v. Mayor of Bridgewater* (k), *Buggin v. Bennett* (l), *Ferguson v. Mahon* (m). [Lord Denman C. J. Before we decide whether you have a right to refer to affidavits, it will be convenient to hear the other side as to the validity of the order on the face of it.]

Jervis (with whom was *Crompton*). The order is good on the face of it. There is no writ of execution except against a party. In the case of *Dicas v. Lord Brougham* (n), the plaintiff who had been committed was not a party ; that was a commitment by the Chancellor sitting in bankruptcy matters.

A Court of Chancery has jurisdiction to commit for contempt. [He was stopped by the Court.]

LORD DENMAN, C. J.—The order is good on the face of it. It states that the party was committed at the bar of the Court for contempt. It is said that there may be a warrant

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| (a) 4 Bing. N. C. 574 ; S. C. 6 Scott, 1. | & D. 88. |
| (b) Vol. ii. pp. 613, 615. | (h) 4 A. & E. 111 ; S. C. 5 N. & M. 440. |
| (c) 5 B. & C. 816 ; S. C. 6 D. & R. 469. | (i) 11 A. & E. 373 ; S. C. 3 P. & D. 204. |
| (d) 6 B. & C. 152 ; S. C. 9 D. & R. 304. | (k) 6 A. & E. 339 ; S. C. 1 N. & P. 466. |
| (e) 2 A. & E. 241 ; S. C. 4 N. & M. 253. | (l) 4 Burr. 2035. |
| (f) 2 East 244. | (m) 11 Ad. & E. 179 ; S. C. 3 P. & D. 143. |
| (g) 8 A. & E. 398 ; S. C. 1 P. | (n) 6 C. & P. 249. |

shewing a commitment for a different cause, we cannot intend that.

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PATTESON, COLERIDGE, and WIGHTMAN Js. concurred.

Pashley then contended he had a right to refer to the affidavits, to shew that the party had never been brought to the bar of the Court at all. He cited *Gardener's case* (a), *Swallow v. Le city de London* (b), *Hawkins' Pleas* of the Crown, *Goldswain's case* (c). [*Coleridge J.* Suppose the warden had stated as a fact that the commitment was at Lord *Langdale's* house, and there this order had been made, are we to be called upon to say that that was not the bar of the Court?]

There is another objection, that this is an order by the Master of the Rolls, and the authority to make the order is confined to a Court of Chancery. The Master of the Rolls has not any such authority given him by the statute. The Court of the Rolls has a local habitation and authority. 4 Inst. 96. It has been said that the Master of the Rolls by his commission cannot make a decree without the assistance of two masters: *Com. Dig. Chancery, B. 4.* A Court of common law has refused to answer a case sent from the Rolls Court.

The other side was not heard on this last objection.

LORD DENMAN C. J.—Two further objections are now made to the return, or rather there is one now made to the return, and another is sought to be introduced by the affidavits. It is said that this order is objectionable, because it is made by the Master of the Rolls, but I am of opinion that we must take notice that the Master of the Rolls is a judge in Chancery. There is no statute or authority which says that the Master of the Rolls is obliged to act in a

(a) Cro. Eliz. 821.

(c) 2 Wm. Bl. 1307.

(b) 1 Sid. 287.

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particular place. The order is an adjudication by the Court that it was sitting, and that a contempt was committed at the bar of the Court, and affidavits cannot be received to contradict that adjudication. It is a fact judicially found by an authority competent to find it. The Lord Chief Justice of the Common Pleas in the case so often referred to of *Brittain v. Kinnaird* (a), says, "But it is said, that a jurisdiction limited as to person, place, and subject-matter, is stinted in its nature, and cannot be lawfully exceeded. I agree; but upon the inquiry before the magistrate, does not the person form a question to be decided by evidence; does not the place, does not the subject-matter, form such a question?"—"The magistrate, it is urged, could not give himself jurisdiction, by finding that to be a fact which did not exist. But he is bound to inquire as to the fact, and, when he has inquired, his conviction is conclusive of it." It is not contended that the warden has stated anything untruly. The Master of the Rolls has adjudicated upon a fact, we cannot suppose untruly, and his adjudication upon it is conclusive.

PATTESON, COLERIDGE, and WIGHTMAN Js. expressed their concurrence, on the ground, that they would take notice that the Master of the Rolls was a judge of the Court of Chancery, and that his adjudication of the fact of the contempt was an adjudication by a Court of competent jurisdiction, which could not be contravened by affidavit.

G.

Prisoner remanded.

(a) 1 B. & B. 438.

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*Tuesday,
June 21st.*

The QUEEN v. GREENE.

A RULE for a quo warranto had been obtained in this case on the affidavit, among others, of Mr. Simpson, town clerk of Lichfield. Affidavits were made in answer. On this rule coming on for argument, *Cole* admitted that he could not support it.

Sir *W. W. Follett* S. G. applied for costs to be paid by Mr. Simpson, on the ground that the relator was a man of straw.

On the question of costs,

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—A rule of quo warranto had been obtained, but was given up. We were disposed to think that it ought to be discharged with costs to be paid by the person who had obtained it, being an attorney, who appeared by the affidavits in answer to have set up a relator who could pay no costs, and could hardly be considered as a real party to the cause. A question however occurred to us, how far this was conformable to the practice of the Court, or indeed to the principles of justice, without a special application, which the party may have an opportunity of answering. It is laid down in *Archbold's Practice*, 1187, (7th ed.) that no costs can be given against a person not a party to the rule without a special application. The same language appears to have been held in the Court of Exchequer in two cases there cited and applied to attornies. Nothing, however, is more certain than that this Court has in several instances granted costs against persons who have made affidavits without being strictly parties, especially against attornies, who are considered as being before the Court, and as its officers bring cases to its notice.

On discharging a rule with costs, the practice of the Court generally is not to order them to be paid by any one not a formal party to the rule, without a separate application with that object.

Dict. The Court has a discretionary power to order costs to be paid by persons making affidavits in support of a motion, particularly attornies in their professional character, but, if the claim for costs arises on the affidavits in answer, there must be a special application.

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This has occurred in matters both of a civil and criminal character, and that, too, where the conduct has been impeached by affidavits in answer, and there has been no opportunity of shewing cause against granting costs. We take the true rule to be, that the Court may adjudge from all circumstances who is the party, and give costs against any party or against an attorney, if the affidavit of the person sought to be charged, or any affidavit produced by an attorney shews good ground for imposing them upon them respectively.

But, if the claim for costs should arise from the affidavits produced in answer, there must be a special application.

In the present case, costs are asked in respect of the statements made in opposition to the rule. Besides, the conduct complained of is not (strictly speaking) what has been done in the character of an attorney. We think, therefore, that costs cannot be granted without a special application.

G.

Rule discharged.

Saturday,
 June 25th.

Part payment
 after action
 brought will
 not take a debt
 out of the
 Statute of
 Limitations.

BATEMAN and others v. PINDER.

ASSUMPSIT by the executors of indorsee of a promissory note against maker. The declaration stated that the defendant in the lifetime of the testator, since deceased, on the 15th March, 1830, made his promissory note for 75*l.* 7*s.* 8*d.* payable on demand to one *Fearnley*, that *Fearnley* indorsed to the testator, and defendant promised to pay the testator; and that after the death of the testator, to wit, on the 1st June, 1837, the defendant promised the plaintiffs, as executors, to pay on request.

Plea, the Statute of Limitations and issue thereon.

On the trial before *Wightman J.* at the Liverpool summer assizes, 1841, it appeared that the note was the joint and several note of the defendant and four others, and was made in the terms stated in the declaration. Another action had

been brought against one of the other makers of the note; and the defendant in that action, after the commencement of the present action, gave a cognovit for 25*l.* payable by instalments, and also paid 1*l.* down on account of the note. This payment was relied upon by the plaintiffs as a bar to the Statute of Limitations. The learned judge directed a verdict for the plaintiffs on the authority of *Yea v. Fouraker (a)*, where it is said, "In an action upon a promissory note, tried before Mr. Justice Noel upon the western circuit, it was there ruled by him and confirmed by this Court, without argument, upon a motion here for a new trial, that an acknowledgment of the debt, *after* the commencement of the action, takes it out of the Statute of Limitations." Leave was given to the defendant to enter a nonsuit.

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Addison, in the Michaelmas term following, moved for a rule nisi accordingly, and also for a new trial on another point. *Yea v. Fouraker (a)* has been overruled. It could not be supported except on the ground that the acknowledgment has the effect of drawing down the original promise. But it is now settled law that the acknowledgment is evidence of a new promise: *Pittam v. Foster (b)*, *Ward v. Hunter (c)*. A part payment has the same effect: per *Parke J.* (during the argument) in *Gowan v. Forster (d)*. A part payment, therefore, after action brought, being the evidence of such new promise, is insufficient to shew there was any promise subsisting at the time of bringing the action. A rule having been granted,

J. Henderson now shewed cause. *Yea v. Fouraker (a)* was recognised in *Thornton v. Illingworth (e)*. In that case it was held that a promise made after the commencement of an action is not sufficient to sustain a replication that the

(a) 2 Bar. 1099.

(d) 3 B. & Ad. 511.

(b) 1 B. & C. 248; S. C. 2 D. & R. 363.

(e) 2 B. & C. 824; S. C. 4 D. & R. 545.

(c) 6 Taunt. 210.

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defendant (who had pleaded infancy) ratified his contract after he came of age. On behalf of the plaintiff in that case it was sought to introduce the analogy from a promise to bar the Statute of Limitations, and *Yea v. Fouraker* (a) was cited. *Bayley J.* said, "There is this distinction between the case cited and the present. There the debt continued from the time when it was contracted, but without the new promise it could not have been recovered, the defendant relying on the protection given by the Statute of Limitations. The ground on which that statute proceeds is, that after a certain time it shall be presumed that a debt has been discharged. A new promise rebuts that presumption, and then the plaintiff recovers, not on the ground of having a new right of action, but that the statute does not apply to bar the old one." *Holroyd J.* also observes, "Where the Statute of Limitations has run, a new promise revives the debt ab initio, and that is equally the case whether the promise is made before or after the commencement of the action." And *Littledale J.* adds, "When the Statute of Limitations is relied upon, an acknowledgment admits the perpetual existence of the debt, and therefore it suffices whether it is made before or after the bringing of the action." *Irving v. Veitch* (b) was also referred to as overruling *Tanner v. Smart* (c).

Lord DENMAN C. J.—*Yea v. Fouraker* (a) is right, if, as explained in *Thornton v. Illingworth* (d), the Statute of Limitations is to be interpreted with reference to the presumption that after a certain time a debt has been discharged. But that doctrine was fully considered and repudiated in *Tanner v. Smart* (c), and it was settled that a new promise is necessary to take a debt out of the statute, and that an acknowledgment is evidence of such new promise, and gives

(a) 2 Bur. 1099.

& R. 549.

(b) 3 M. & W. 90.

(d) 2 B. & C. 824; S. C. 4 D.

(c) 6 B. & C. 603; S. C. 9 D.

& R. 515.

a new right of action. *Tanner v. Smart* (a) is not overruled by *Irving v. Veitch* (b), and *Parke B.* expressly distinguishes them.

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PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule absolute (c).

(a) 6 B. & C. 603; S. C. 9 D.
& R. 549,
(b) 3 M. & W. 90.

(c) No counsel appeared in support of the rule.

IN THE EXCHEQUER CHAMBER.

BOORMAN and others v. BROWN (d).
(ERROR FROM THE COURT OF QUEEN'S BENCH.)

Tuesday,
June 21st.

CASE. The declaration stated, that before and at the time of the committing of the grievance, &c. the plaintiffs carried on the business of linseed crushers in Kent, and the defendant carried on the business of an oil broker in London. That before the time, when &c., to wit, on the 1st January, 1836, the plaintiffs had retained and employed the defendant as such broker to sell at London, for the plaintiffs, certain quantities, to wit, 30 tuns of linseed oil, and to deliver the same in the port of London, according to the terms of the contract or contracts of sale, to such persons as should become the purchaser or purchasers thereof, for a certain reasonable commission and reward to the defendant in that behalf, which retainer and employment the defendant then accepted. That before the time when, &c., to wit, on the

A declaration stated that the defendant had been retained by the plaintiffs as their broker to sell certain goods and deliver the same, according to the terms of the contract, to such person as should become the purchaser. It then alleged that the defendant sold the goods to one P., and P. purchased at certain times of delivery,

(d) Decided in Trinity term, 1841 (May 29).

the amount to be paid on delivery.
Held, that this amounted to an express contract by the defendant with the plaintiffs to deliver what he sold for ready money only.

That the duty of the broker arose from his contract not to deliver but for ready money. And that *case* was maintainable against the defendant for delivering without the price being paid.

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11th January, 1836, the defendant, *as such broker* as aforesaid, in pursuance of the said retainer and employment, and being duly authorised by the said plaintiffs, and one *J. G. Peacock*, in that behalf, made a certain contract between the plaintiffs and *J. G. P.*, whereby the plaintiffs sold to *J. G. P.*, and he purchased of the plaintiffs, the said 30 tuns of linseed oil, at the price of 42*l.* 10*s.* per tun and usual allowances, to be delivered in the river Thames, 10 tuns the last fourteen days in March then next, 10 tuns the last fourteen days in April then next, 10 tuns the last fourteen days of May then next, and the amount of each parcel to be paid for upon delivery in ready money, less 2½ per cent. discount, which contract the plaintiffs and *J. G. P.* then respectively accepted. That after the making of the said contract, the plaintiffs in pursuance thereof consigned to the defendant, at London, in the last fourteen days of March and April respectively, two several parcels of linseed oil of 10 tuns each, to be delivered by him to *J. G. P.*, *upon the price and amount thereof being paid* by *J. G. P.* to him the defendant in ready money, less 2½ per cent. discount, and the defendant then delivered the same respectively to *J. G. P.* upon such payment thereof being so made. That after making the contract, and in pursuance thereof, and of such retainer and employment, to wit, on the 26th May, 1836, the plaintiffs consigned to the defendant, as such broker as aforesaid, at London, 10 other tuns of linseed oil, being the residue of the said 30 tuns comprised in the contract, to be delivered by the defendant to *J. G. P.* upon payment of the price thereof by *J. G. P.* to him the defendant; and the said last-mentioned 10 tuns of linseed oil being so consigned, afterwards, to wit, on the 29th of May, in the year aforesaid, arrived in London aforesaid, on board of the said barge or vessel, of all which the defendant had notice, and then took upon himself the delivery of the said last-mentioned 10 tuns of linseed oil, according to the terms of the said contract, and thereupon *it became and was the duty of the defendant, as such broker* as aforesaid, to use all

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reasonable care and diligence that the said 10 tuns of linseed oil should not be delivered to *J. G. P.*, or any other person *without the price thereof being paid* to him (the defendant), according to the terms of the contract, yet the defendant not regarding his said duty, but contriving to defraud and injure the plaintiffs, did not nor would use reasonable care and diligence that the last-mentioned 10 tuns of linseed oil should not be delivered to *J. G. P.*, or any other person without the price thereof being paid to the defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises, that by and through the mere negligence and carelessness of the defendant, the last-mentioned 10 tuns of linseed oil, after the arrival thereof at London aforesaid, to wit, on the 31st May, 1836, were delivered to certain persons carrying on trade under the firm of Messrs. *John Hare & Co.* at Bristol, without the price for the same, or any part thereof, being paid by the said *J. G. P.*, or any other person, to the said defendant, by reason whereof the said *J. G. P.* having become a bankrupt, and being unable to pay for the said oil, the said plaintiffs have lost and been deprived of the said oil, and the price and value thereof.

Pleas : 1. Not guilty.

2. That the plaintiffs did not consign to him, nor did the defendant take upon himself the delivery of the oil *modo et forma*.

3. That the plaintiffs did not employ the defendant as such broker, as in the declaration mentioned, to sell the linseed oil in the declaration mentioned, and to deliver the same for commission or reward to him the defendant in that behalf, nor did the defendant accept such retainer and employment *modo et forma*.

Issue was joined on the above pleas.

On the trial of these issues a verdict was found for the plaintiffs. The Court below arrested the judgment (a) on

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the ground that the declaration did not disclose a right of action. Thereupon this writ of error was brought.

Cleasby for the plaintiffs (a). Two objections have been made to the right of the plaintiffs to recover.—That the duty stated in the declaration is not shewn by it to have attached to the defendant: That this duty arising by matter of contract only, and the breach being a mere non-feasance, the proper remedy is assumpsit and not case.

The substance of the allegation in the declaration is, that the defendant was employed as an oil-broker to sell and deliver oil on the payment of the price, and that by his negligence the plaintiffs' goods have been lost and the price not obtained. The contract stated to have been made by the defendant for the sale of the oil was to *Peacock & Co.* cash. It is not stated that it was delivered to *Peacock & Co.* without receiving the price, but that it got into the hands of *Hare & Co.* That makes no difference. The inducement of the declaration shews how the goods became under the control of the defendant. There was a general employment to sell, and it is said that though the inducement may shew some duty, it would not be such a duty as is stated in the declaration. But the allegation that it was the duty of the defendant, as "such broker," means that it was his duty so specially employed. The declaration, particularly after verdict, need not state in express terms the duty which must exist in order to support the action; it is sufficient if it can be collected from all the facts stated in the declaration. Nor if a duty be specially alleged, are the Court in construing it limited to the inquiry whether that duty arises: *Lancaster Canal Company v. Parnaby* (b). It is clear there was some duty imposed on the defendant by his acceptance of the goods; *Bul. N. P. 73.* The goods

(a) On Monday, February 7th,
 before *Tindal C. J., Erskine* and
Maule Js. and Alderson, Gurney

and *Rolfe Ba.*

(b) 11 A. & E. 225; S. C. 3 P.
 & D. 162.

are entrusted to the defendant, who is to do something with them. He cannot do as he likes with them; he must use in dealing with them fair and reasonable care and skill. By his improper conduct they have been delivered to another person. The office of a broker is one well known to the law: 2 *Jac.* 1, c. 21 (a), 6 *Ann.* c. 16.

It is said there is no common law duty, that this is a mere case of contract. It is a case of employment, which, strictly speaking, is not a contract. An employment may be revoked before a performance, it could not if it were a contract. A duty may arise out of the contract upon which an action would lie, but the duty takes precedence of the contract. Nor is this the case of a nonfeasance. There would be a nonfeasance if this were a refusal to perform the contract at all; *e. g.* if there were a contract to build a house, a refusal to take a step for that purpose might be said to be a nonfeasance, but the building of a bad house would be a misfeasance. If this were a case of pure contract, still if this is not a simple nonfeasance, case lies. Fraud in law, and not fraud in fact, is necessary to maintain the action. There are many instances—actions against attornies for negligence—against ship-owners, who are not common carriers—many cases of actions against bailees. *Marzetti v. Williams* (b) is a very strong case on this point. That was an action on the case, in which the plaintiff proved no actual damage, yet it was held that he was entitled to a verdict for nominal damages, because the action was in substance founded on a contract, and it was said it would make no difference whether the action was in form tort or assumpsit. *Godefroy v. Jay* (c), *Govett v. Radnidge* (d) are clear authority for allowing a party to allege his gravamen to consist in a breach of duty arising out of an employment, treating that breach as tortious negligence. There may have been some conflict of authorities as to what the conse-

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(a) Intituled "An Act against Brokers."

(b) 1 B. & Ad. 423.

(c) 7 Bing. 413; 3 C. 5 M. & Payne, 284.

(d) 3 East, 62.

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quences are of framing a count in tort on a breach of duty arising from a contract, *e. g.* whether a plea in abatement for non-joinder is good in such an action, but they all concur in the recognition of such a form of action; *Powell v. Layton (a)*, *Pozzi v. Shipton (b)*, *Coggs v. Bernard (c)*. In *Burnett v. Lynch (d)* Lord Tenterden C. J. said, "It by no means follows that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable." *Hancock v. Caffyn (e)* recognised the authority of this case. Two cases only were referred to by the other side in argument in the Court below: *Orton v. Butler (f)* and *Corbett v. Packington (g)*. In *Orton v. Butler (f)* there were two counts in case for deceit, and a third intended to be a count in case, and which was either a count in assumpsit, or a count in trover. Whichever it was, it was so informal as to be clearly bad on special demurrer, and the judgment of the Court was on special demurrer. In *Corbett v. Packington (g)* the ground of the judgment of the Court was that there was a misjoinder of counts, one of them being in case, and the other only in assumpsit, though there was an abortive attempt to make it resemble a count in case.

Butt contra. In this case there is a mere nonfeasance and not a misfeasance. The real ground of the plaintiffs' complaint is that the defendant negligently would not get the money; there is no complaint in the declaration of a misdelivery. It must be contended on the other side that every breach of contract would warrant an action on the case, and that the old boundaries of forms of action exist

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| (a) 2 N. R. 365. | (e) 8 Bing-366; S. C. 1 M. & |
| (b) 8 A. & E. 963; S. C. 1 P. & | Scott, 521. |
| D. 4. | (f) 5 B. & Ald. 652; S. C. 1 D. |
| (c) 1 Ld. Raym. 912. | & R. 282. |
| (d) 5 B. & C. 589; S. C. 8 D. | (g) 6 B. & C. 268; S. C. 9 D. |
| & R. 368. | & R. 258. |

no longer. In the instances collected in *Com. Dig.* "Action on the Case for a Misfeasance, contrary to an undertaking" (A. 3), there is not one of a mere nonfeasance. It does not follow that, because there is a contract, a common law duty arises out of it, and, unless there is, case is not maintainable for a nonfeasance. In *Lancaster Canal Company v. Parnaby* (a) there was a common law duty; but there is none such here. Cases of deceit give rise to an action of case, or of false warranty, which is a fraud in law: *Com. Dig.* Action upon the Case for a Deceit, A. 11 and F. 3. In those cases the defendant must be alleged to have acted falso et fraudulenter. There is no authority for any action on the case, except on such ground as would bring it within one of the divisions of *Com. Dig.* The allegation of negligence in this declaration will not prevent the Court seeing that the real gravamen is a nonfeasance. Suppose a builder were not to complete a house within the stipulated time, case would not lie. In *Marzetti v. Williams* (b) the action was founded on the custom of London. [*Alderson B.* It is put by the Court on the contract.] If so, there is no allegation here of any undertaking by the defendant, but that of delivering to *Peacock*. *Rogers v. Head* (c), cited in the Court below, was an action of assumpsit, which in the old books is called action on the case sur assumpsit. In *Burnett v. Lynch* (d) there was no contract at all, case was the only form of action that would lie. *Govett v. Radnidge* (e) was a very clear case of misfeasance. *Godefroy v. Jay* (f) was an action against an attorney for negligence. *Pozzi v. Shipton* (g) was decided on the ground that after verdict the Court must view the declaration as grounded upon the general custom of the realm by which carriers are bound. Here it is not alleged that the goods were not

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- (a) 11 A. & E. 223; S. C. 3 P. & D. 162. (e) 3 East, 62.
 (b) 1 B. & Ad. 423. (f) 7 Bing. 413; S. C. M. & Payne, 284.
 (c) Cro. Jac. 262. (g) 8 A. & E. 963; S. C. 1 P.
 (d) 5 B. & C. 589; S. C. 8 D. & D. 4.
 & R. 368.

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properly kept, or not properly delivered. *Corbett v. Packington* (a) is a direct authority that case will not lie for a breach by nonfeasance of any duty arising by contract beyond that imposed by the common law. *Orton v. Butler* (b) shews the great importance attributed to keeping the boundaries of actions clearly defined. The other objection is that the duty, the breach of which the declaration complains of, is improperly alleged in it to be part of the general duty of a broker, and to arise from the defendant's employment in that capacity. [*Alderson B.* It is admitted that the duty does not attach to the general character of a broker. *Tindal C. J.* The question is, can it be implied from the facts stated?] There was no general delivery and no acceptance. In *Elsee v. Gatward* (c) the authorities upon the distinction between case for a nonfeasance and for a misfeasance are fully considered.

Cleasby in reply. There is a fallacy in the use of the term "nonfeasance"; whatever of neglect there is in the conduct of man is always misfeasance. Negligence is usually alleged in general terms, as it is here. Case lies for the loss of the goods, no matter how lost. In *Com. Dig. Action on the case for Negligence*, one of the divisions (A. 4) is "for a neglect to do that which he has undertaken." The instance given is, "So if a man neglected to do that which he has undertaken to do, an action upon the case lies: as if any one who is not a common carrier undertake to carry goods, and deliver them at such a place; if he does not carry them, an action on the case lies." It is true the case referred to in *Croke* is in *assumpsit*, but there is the authority of *Caryer C. B.* for the position that case would be maintainable. Where a person is employed, every omission by him in the discharge of his employment is a misfeasance: 1 *Roll. Abr.* 105, *Action sur Case, Pur quel act gist.*

Cur. adv. vult.

- (a) 6 B. & C. 268; S. C. 9 D. & R. 282.
 & R. 258. (c) 5 T. R. 143.
 (b) 5 B. & Ald. 652; S. C. 1 D.

TINDAL C. J. now delivered the judgment of the Court. —The judgment for the plaintiffs in the Court below (who are also the plaintiffs in error) having been arrested on the ground of the insufficiency of the declaration, the whole question before us turns on the form of the action brought, and on the declaration itself.

The defendant makes two objections to the plaintiffs' right to recover in this action. First, that the action is brought for a nonfeasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, and not an action of tort; and secondly, that the duty stated in the declaration does not arise from the facts therein alleged.

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently either *assumpsit* or case upon tort, is not disputed; such are actions against attornies, surgeons and other professional men, for want of competent skill or proper care in the service they undertake to render, actions against common carriers, against ship-owners on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or contract, at the election of the plaintiff. And, as to the objection that this election is only given where the plaintiff sues for a misfeasance and not for a nonfeasance, it may be answered, that in many cases it is extremely difficult to distinguish a mere nonfeasance from a misfeasance, as in the particular case now before us, where the contract stated in the declaration on the part of the broker is in substance to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is, a misfeasance as it is a nonfeasance, the distinction between the two being in that case very fine

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and scarcely perceptible. But further, the action of case upon tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case against shipowners simply for not safely and securely delivering goods according to their bill of lading, and as in the case of *Coggs v. Barnard* (a), where an undertaking is stated in the declaration as the ground of action, and, to give no further instance, the case of *Marzetti v. Williams and others* (b), where the decision, that the plaintiff was entitled to nominal damages without proof of any actual damage, rests entirely on the consideration, that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

The principle in all these cases would seem to be, that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

As to the second objection, we cannot but think the duty, upon the breach of which this action is founded, arises by necessary inference from the terms of the contract between the plaintiffs and the defendant as set forth in the declaration. The defendant is there stated to have been retained by the plaintiff as their broker to sell certain goods, and to deliver the same "according to the terms of the contract to such person as should become the purchaser;" and the declaration then proceeds to allege that the defendant, as such broker, "made a certain contract between the plaintiffs and one *Peacock*, whereby he sold to *Peacock* and *Peacock* purchased of the plaintiffs the oil therein mentioned, at certain times of delivery, *the amount of each parcel to be paid upon delivery in ready money*;" and coupling together the terms of the particular contract made by the defendant with the terms of the defendant's retainer by the plaintiffs, we think it amounts to an express contract on the part of the defendant to deliver what he sold on the payment of ready money only, and that the duty of the broker arose

(a) 2 Ld. Raym. 909.

(b) 1 B. & Ad. 415.

from this express contract so stated in the declaration, and not simply from his character of broker, which the Court of Queen's Bench appears to have considered to be the meaning of the declaration.

We therefore think that the plaintiffs are entitled to the judgment of the Court in their favour.

G.

Judgment reversed.

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FALL and others, Churchwardens and Overseers of the Poor of the Parish of ST. MARY, LAMBETH, v. The QUEEN, on the Prosecution of ARMSTRONG and another.

(ERROR FROM THE COURT OF QUEEN'S BENCH.)

Wednesday,
June 29th.

MANDAMUS. A meeting had been held in the parish of St. Mary, Lambeth, for the election of parish officers, at which time there was a division and a poll. After the poll this writ of mandamus was issued, directed to the churchwardens and overseers of the poor of the parish, commanding them to attend a scrutiny of the poll, and to produce thereat the poor rate and other books. They made a return. This return was traversed by *Armstrong* and *C. F. Francis*, the defendants in error, and the traverse was tried and a verdict was given for the crown with one shilling damages. The Court below gave judgment on this verdict against the plaintiffs in error for the damages and costs (a).

G. Hayes for the plaintiffs in error (b). The judgment of the Queen's Bench is erroneous in awarding damages and costs to the traversers of the return, who have sustained no legal injury. The question turns on the construction of the stat. 1 *Will.* 4, c. 21, upon which the judgment of

The statute 1 *W.* 4, c. 21, s. 3, extends the provisions of the statute 9 *Anne*, c. 30, to all writs of mandamus, and prosecutors are entitled by it to recover damages and costs for a false return, though they have no private or particular interest in the thing commanded to be done. The traverse and joinder of issue shew who are the prosecutors.

(a) See the case reported 1 G. & D. 117. C. J., *Alderson*, *Erskine* and *Maule* Js. and *Parke*, *Gurney* and *Rolfe* Bs.

(b) Argued in Hilary Vacation last (February 7th), before *Tindal*

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the Court below proceeds, and it is contended that the statute did not extend the common law rights of the parties with regard to damages and costs. It will be necessary to consider, 1st, the common law; 2dly, the effect of the stat. 9 *Ann.* c. 20; and 3dly, the stat. 1 *Will.* 4, c. 21.

1. At common law it is clear the traversers in this case had no right to recover damages in any form of proceeding. The question raised by the mandamus relates to the proper mode of taking the poll on the election of parish officers, and the traversers are not shewn to be officers, but merely inhabitants and parishioners, and they describe themselves as suing on behalf of themselves and the rest of the parishioners. At common law no traverse was allowed, but the usual remedy for a party who had been injured by a false return was an action on the case. This action was governed by the same general principles with reference to damages as the other common law actions, and accordingly it was held not to be maintainable by a party who had not suffered some particular damage. Thus it is laid down:—
 “That if the matter concerns public government and no particular person is so far interested as to maintain an action, the Court will grant an information against the particular persons who made the return.”—*Bac. Abr. Mandamus* (L.) citing the case of the *Surgeons’ Company*, 1 Salk. 374, which arose on a mandamus to a corporation to appoint officers. *Rex v. Overseers of Spotland* (a) is in point to shew that no action was maintainable in a case like the present, and that the only remedy was by information, and this course was adopted in *Rex v. Petteward* (b) and *Rex v. Justices of Lancashire* (c), which, like the present, were cases relating to the appointment of parish officers. These authorities proceed on the principle laid down in *Com. Dig. Action on the Case* (B. 2), “action on the case does not lie where there is no particular damage to any one, but it is common to many, as for not reading

(a) *Ca. temp. Hard.* 184.

(c) 1 D. & R. 485.

(b) 4 Burr. 2452.

divine service to his tenants of a manor; for if one may, all may have an action." And several familiar examples are given, as for a common nuisance without particular damage, by an inhabitant of A. for not keeping a common ferry, for obstructing a common highway, and other instances. Here the question affects any inhabitant of Lambeth equally with the traversers, who do not attempt to set up any particular injury, and therefore, according to all the authorities cited, an action for a false return was not maintainable, and an information was the proper remedy. These authorities also shew that the mere fact of a party having come forward as the prosecutor of a mandamus in such a case would not entitle him to maintain an action, for in all the cases referred to, some party interested must have prosecuted the writ of mandamus, upon which informations were granted. Such a party is in the situation of a voluntary public prosecutor, and the cost of prosecution cannot be considered as any private damage to him. But on the present record it is not even alleged that the traversers of the return were the prosecutors of the mandamus.

2. *As to the statute 9 Ann. c. 20.*—This statute first introduced the mode of proceeding by traverse of the return, but it was confined to corporate offices. In those cases, by sect. 2, the prosecutor became entitled to recover "his or their damages and costs in such manner as he or they might have done in such action on the case as aforesaid," *i. e.* an action on the case for a false return. The claimant of a corporate office, who was refused admission, and prosecuted a mandamus to enforce his right, sustained a private and individual injury by the obstruction, sufficient to support an action. Before the stat. 9 Ann. c. 21, he was of course entitled to bring an action on the case for a false return, and that statute merely gave him a more convenient and expeditious mode of enforcing his common law right, and enabled him to recover on a traverse costs and damages in precisely the same manner as he would have been entitled to recover them in an action. *Kynaston v. The Mayor of*

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Shrewsbury (a) arose on the statute, and there the judgment of the Queen's Bench was reversed, and a venire de novo awarded, because no damages had been found by the jury, but the prosecutor in that case, who was the claimant of a corporate office, had a clear right to recover damages in respect of the private injury which he had sustained.

3. *As to the statute 1 Will. 4, c. 21, s. 3.*—This statute, like the stat. 9 *Ann.*, was not intended to interfere with the common law right of parties to damages, but its sole object was to extend the provisions of the stat. 9 *Ann.* with regard to the mode of enforcing those rights. The third section expressly refers to the provisions of the stat. 9 *Ann.*, and enacts in general terms that the several enactments of that statute as to returns to writ of mandamus, and the proceedings on such returns and the recovery of damages and costs shall be applicable to all writs of mandamus. This is an adoption of the language of the former statute, and its effect is precisely equivalent to a re-enactment of the provisions of the statute *Ann.* without the limitation to corporate offices. Several of the enactments of the stat. 9 *Ann.* c. 21, as sections 1, 6, and 7, are applicable to all writs of mandamus, but sect. 2 only admits of application to cases where the prosecutor of a mandamus was legally entitled to bring an action on the case for a false return, or, in other words, where he had sustained individual damages. This construction will give the benefit of recovering damages on a traverse to a very large class of cases which were not within the statute 9 *Ann.*, as in the case of claimants of offices not corporate, and all other cases of mandamus affecting individual rights. But in other cases of a public nature, like the present case, where no private damage has been sustained, and where no action for a false return was maintainable, there will be no right to damages on a traverse. Any other construction would be quite at variance with the language of the legislature. How can it

(a) 2 Stra. 1051; 7 Bro. P. C. 396.

be said that a party is to be allowed to "recover *his* damages and costs in such manner as he might have done in such *action on the case* as aforesaid," when it is conceded that he has sustained no legal damage, and could maintain no action? The other construction requires the language of the statute to have been "shall recover damages although he or they may have sustained none, and although he or they could not bring an action." But this is in direct opposition to the language actually used. There is no reason for doing violence to the language of the legislature by any argument drawn from a supposed intention. In *Rex v. Williams* (a), *Foster J.* stated that the statute 9 Ann. c. 20, was drawn by *Powell J.* with great care and attention, and that there was no reason for extending it; which statement was cited and approved of by Lord *Kenyon C. J.* in *Rex v. Wallis* (b), and in both of these cases the Court refused to give costs in a quo warranto information, which was not clearly within the statute. In the former case also Lord *Mansfield C. J.* points out the distinction between public offences and cases affecting the interest of private persons, and observes that the provisions of the statute, relative to quo warranto, were intended to be confined to the latter cases only; and there can be no doubt that the mandamus clauses were governed by the same intention.

With regard to costs, it is an established rule that statutes giving costs are to be construed strictly, which rule was recognised in *Rex v. Glastonby* (c), where the Court held that costs were not recoverable on the traverse of an inquisition on a writ of Noctanter. And with regard to damages, why should the language of a statute be extended beyond its fair import, for the purpose of giving damages to a party who it is admitted has sustained no legal injury? There is no difference in principle between nominal and substantial damages; in all cases they must be viewed as a compensation for a legal injury: but, if there be no legal

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(a) 1 Burr. 402. (b) 5 T. R. 379. (c) Ca. temp. Hard. 355.

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injury, what becomes of the compensation? It is a rule that statutes are to be construed as near "the rule and reason of the common law as may be" (a). But a construction, which gives a right to recover damages for an injury not sustained, is in subversion of all common law principles. [Alderson B. According to your argument, no traverse can be taken under the last statute upon a return where there has been no individual damage, for, if you admit the right to traverse, the right to recover damages appears to follow.] That will be so if the recovery of damages be considered as necessarily connected with every traverse, but there is no reason for going to that length. The legislature may have intended that a traverse should be allowed in every case of a return to a mandamus, but probably overlooked cases relative to questions of a public nature in which no damage had been sustained. In such a case the result of a verdict falsifying a return is to shew the Court that a public offence has been committed, for which an information lay, but no injury committed or individual right injured, for which an action could be brought.

With regard to the main object of the traverse, viz. the peremptory mandamus, no judgment is necessary; for the production of the postea falsifying the return has been held sufficient to support a motion for a peremptory mandamus: *Foot v. Prowse* (b), *Bac. Abr. Mandamus* (M.) But, if a judgment is to be given, the only appropriate one appears to be the same judgment that would be pronounced on an information, viz. a fine, as in the case of a quo warranto information at common law, or even under the stat. 9 *Ann.*, where the circumstances do not admit of a judgment of ouster: *Rex v. Biddle* (c). The present traverse arises on proceedings which are in the nature of criminal proceedings, and in general in traverses on such proceedings no damages or costs are recoverable. And on the other hand,

(a) *Plowd.* 365; 1 *Saund.* 240. (c) 2 *Str.* 952.(b) 1 *Str.* 697.

even in civil actions, the Court was always justified in inflicting a fine wherever it appeared that any thing in the nature of an offence against the crown had been committed, as a trespass *vi et armis* and other cases (a). Probably the intention of the statute might be effected by such a judgment in the present case, and it would also be consistent with crown law principles. But at all events no party can have a right to recover damages who has sustained no private injury, and the judgment ought therefore to be reversed.

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Erle contrà. The stat. 1 *Will.* 4, c. 21, s. 3, extends to all writs of mandamus the provisions of the stat. 9 *Ann.* c. 20, by which a traverse was substituted for an action for a false return; so that now that course may be taken, whether, before the stat. 1 *Will.* 4, the stat. *Ann.* was applicable to all writs of mandamus, or, as it has been contended, to those only in which the prosecutor could have had an action for a false return. The language of this statute is as general as it can be. In the Court below, the question was not argued, whether an action on the case could have been maintained in this instance. Under the stat. 9 *Ann.* c. 20, s. 2, an action would lie, whether the prosecutor had an interest or not. It may be well argued that in every case the prosecutor of a mandamus has an individual interest in the return, and a right to an action if it be false, for a false return makes his writ abortive. The case of *Rex v. Pettward* (b) and other similar cases, where proceedings by way of information were taken against parties who had made a false return, do not shew that that is the only mode of proceeding, but that where the public are interested the Court of Queen's Bench will grant an information. What Lord Hardwicke C. J. said in *Rex v. Spotland* was a mere dictum (c). *Green and others v. Pope* (d) is a direct au-

(a) 1 Arch. Prac. 335, 7th ed.

(c) Ca. temp. Hard. 184.

(b) 4 Burr. 2452.

(d) 1 Ld. Raym. 125.

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thority for the prosecutors. That was an action on the case for a false return to a mandamus to register a meeting-house. It recognizes and proceeds upon the authority of the case of *Ward v. Brampton* (a), where it was held that two persons who had jointly sued out a mandamus to swear them in churchwardens might join in an action on the case for a false return. "For the mandamus and the whole prosecution and charge thereof was joint, and the office is no office of profit, nor is the action brought for that, but for the unjust return, whereby they were put to the charge of the mandamus." And in *Green v. Pope* (b) it was said *per Curiam*, "This action is brought not only to recover damages, but also to have a peremptory mandamus." It sufficiently appears by the traverse who the prosecutors are of this writ of mandamus. It never appears in any other manner.

Hayes replied.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court. The Court have considered this case, which has stood over for some time, and have come to the conclusion that the judgment of the Court of Queen's Bench ought to be affirmed.

The mode of legislation adopted by the stat. 1 *Will.* 4, c. 21, s. 3, by referring to the prior stat. of 9 *Ann.* c. 20, s. 2, instead of containing express enactments applicable to all writs of mandamus, has created the principal difficulty in the case, and caused a doubt to exist whether the effect of the statutes together is not to give damages and costs in those cases only where the prosecutor of the mandamus might have recovered damages in respect of a particular injury in an action on the case for a false return; for the provision in the stat. of *Ann.* was applicable, as seems to

(a) 3 *Lev.* 362.

(b) 1 *Ld. Raym.* 125.

have been decided by the case of *Kynaston v. The Mayor of Shrewsbury (a)*, to such cases only.

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But we are of opinion that the construction of the stat. 1 Will. 4 is not to be so limited, and that to give effect to the intention of the legislature, apparent in that act, we must hold that in *every* case the person who sues or prosecutes a mandamus is thereby entitled to damages and costs. This statute provides that the enactments in the stat. *Ann.* as to the recovery of damages and costs shall be extended and made applicable to *all* other writs of mandamus, and we think it clear that the legislature intended that the person suing or prosecuting in *all* such writs should have his damages and costs, whether an action for a false return on the ground of a particular injury sustained by him would lie or not.

Another objection was started in the course of the argument, namely, that it did not appear sufficiently on the face of the record that the defendants in error were the persons who had sued or prosecuted the writ.

The Court have also felt considerable doubt as to this point, but their opinion now is, that the two defendants in error must be taken to be the persons suing or prosecuting the writ in this proceeding, which is of a singular and anomalous character. The plaintiff in error has chosen to join issue with them, and thereby treated them as persons competent to traverse, which could not be the case unless they had either sued or prosecuted the mandamus. Such an objection ought to have been taken in an earlier stage of the proceedings.

G.

Judgment affirmed.

(a) 2 Str. 1051.



CREASE v. SAWLE, Bart. and others (*a*).

The Duke of Cornwall's lessee of the toll of tin, in a mine under tin bounds, is rateable to the relief of the poor.

TRESPASS for entering plaintiff's dwelling house and taking his goods.

Pleas. 1. Not guilty. 2. That the plaintiff was rateable to the relief of the poor of the parish of St. Austell in the county of Cornwall, in respect of his occupation of certain land within the said parish. That before the said time &c., to wit, on the 26th February 1838, in the county aforesaid, by a certain rate then made, allowed and published, according to the statute in that case made and provided, the plaintiff, so being an occupier of land in the said parish, was duly rated and assessed, for and in respect of his occupation of the said land, towards the relief of the poor within the said parish, for the then present year, in the sum of 108*l.* 9*s.* Averments, that payment of the said sum was demanded and refused, that the plaintiff was summoned before two magistrates to pay or shew cause, that he did neither, and that they thereupon issued their warrant to the defendants as churchwardens and overseers of the parish, and that the defendants committed the trespass in distraining for the said sum. Verification.

3. That the trespasses were committed in taking of a distress of the goods in the declaration mentioned, under the authority of the 43 *Eliz.* Verification.

Replications. 1. Issue joined on the first plea.

2. To the second plea, that true it is that the plaintiff was summoned, and that the magistrates issued their warrant, and that the defendants were churchwardens and overseers, nevertheless *de injuriâ*, &c.

3. To the third plea, *de injuriâ*, &c.

Issue on the two last replications.

The case was tried at the Cornwall assizes, and a special verdict returned.

As to the first issue, verdict for the plaintiff.

(*a*) Decided in Hilary Vacation last (Feb. 7).

As to the 2nd and 3rd issues, the verdict found the following facts. The defendants were overseers of St. Austell, and on the 17th January, and on the 7th April 1838 two several rates for the relief of the poor of the said parish were made and duly allowed, and published.

The plaintiff was rated in the said rates at the sums of 108*l.* 9*s.*, and 40*l.*

The rates contained, among others, the following columns,

Names of occupier.	Name of owner.	Description of property, whether land or houses, &c., and situation or name of property.
Henry Crease	Henry Crease	Tolls of tin.

The distress, and the proceedings preliminary to it, were then stated.

By indenture of lease of the 1st August 1815, George the Fourth, when Prince of Wales, demised to Edward Smith, Esq. for ninety-nine years, determinable on lives, all the toll and farm of tin or tin toll, which should be gained, arise or become due, in any place within the several lordships, manors, precincts or territories, belonging to or being part or parcel of the duchy of Cornwall, in the county of Cornwall, and all profits, commodities, advantages and emoluments to the said toll and farm of tin, or tin toll, within the several lordships &c., belonging, happening and arising; and also all the tin mines found, or to be found, within the several inclosed lands of the said several lordships &c.; and also all the toll and farm of tin or tin toll, which should be gained, arise, or become due, in any place within all and every the manors, boroughs, tenements and premises in the said indenture thereafter particularly mentioned, and which (with the exception of all mines and minerals) had been sold in 1796 under the land tax redemption act to several persons, and among other manors and places, within the manor of Tewington with its members and appurtenances. There is also contained in the said indenture of

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lease a covenant by the said *Edward Smith*, his executors, administrators and assigns, that he would by himself or his deputy or deputies, or workmen, enter into and upon the premises demised by the said indenture of lease, or intended so to be, and within the same dig and search for tin, and the same tin so to be found, at his, their or any of their free will, take and carry away, and likewise make, do and perform all things necessary to digging and searching for, carrying away of tin, and filling up the tin pits and shafts according to the custom of tin works in the said county of Cornwall.

Smith entered and became possessed of the premises &c., granted by that lease which is still existing, and all the interest therein, (except so far as the same is affected by the indenture of the 17th of September 1835, hereinafter mentioned), before and at the time of the making the said rates respectively, was and still is vested in the plaintiff.

Within the parish of St. Austell are situate two of the manors mentioned in that lease, viz. the manor of Treverbyn Courtney, parcel of the annexed possessions of the said duchy, and the manor of Tewington, late parcel of the ancient possessions of the duchy. At the time of making the said rates respectively, and from thence to the present time, the yearly value which the plaintiff derived in the parish of St. Austell under the said lease was 1516*l*. The toll of tin payable to the plaintiff under the said lease is one tenth part of all tin ore raised within tin bounds in the manor of Tewington, and one fifteenth of all tin ore raised within the bounds in the manor of Treverbyn Courtney.

These tolls are payable by the custom of the Stannaries, by the workers for tin within tin bounds, without deduction or any charge or risk to the receiver.

The custom of the Stannaries as to the bounds is as follows, "any tinner may bound any wastrel land within the county of Cornwall that is unbounded or void of lawful bounds; and also any several and inclosed land that hath been anciently bounded and assured for wastrel by delivering of tin toll to the lord of the soil, before that the

hedges were made upon it; and also such and so much of the prince's several and inclosed customary land, within the ancient duchy assessionable manors, as hath been anciently bounded with turfs, according to the ancient custom and usage within the said several duchy manors, and not otherwise: the tinner paying out of such land so bounded, the usual toll only as is generally paid within the Stannaries, that is, the fifteenth dish or part, saving in such places where special custom hath limited another rate of toll."

The mine, from which the plaintiff derives 1300*l.* of the said 1516*l.*, is called Buckler's mine. This mine is situated on Boscundle common, which was uninclosed till the year 1800, when it was included within a hedge by Mr. *Carlyon*, the then owner of the common. Since 1800, and before 1810, several parts of it have been separated by hedges, and allotted to different tenants, who occupy their respective portions as part of their tenements, and the rest remains as before. Part of the said manors is within the said allotments. Boscundle Common is under tin bounds, and is within the manor of Tewington, and the customary toll for all tin ore raised within these tin bounds belongs to the plaintiff under the above lease. Buckler's mine is very ancient, is situate within many sets of tin bounds, and has been worked by the present adventurers since 1831.

By indenture of the 17th September 1835, between the plaintiff of the one part, and *John Taylor* and *John Rundle* of the other part, the plaintiff granted to the parties of the second part free liberty and license and authority to enter into and upon all that the land and ground comprised within the limits thereafter mentioned and described, parcel of the manor of Tewington, in the parish of St. Austell, that is to say, (describing it), with full power and liberty to break and open the soil and ground, and to drive any adits and levels, and to sink any shafts, and to make any erections or buildings for digging and searching for tin and tin ore in the said premises, according to the custom of tin works in Cornwall; and also with full liberty at their

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or any of their free will and pleasure to carry and take away the same tin and tin ore, and likewise to do and perform all things necessary to the digging, searching for, and carrying away, tin and tin ore, and filling up the tin pits and tin shafts according to the custom of tin works in Cornwall. Reserving nevertheless unto the plaintiff liberty during the term to make, take up, drive and sink, from and in any part of the said premises, or the mine or mines to be worked thereon, at or above the level of the deepest adit therein for the time being, any adits or drafts with shafts necessary and proper for driving and continuing the same into any adjoining lands whatsoever, and to keep open, repair and use the same adits or drafts and shafts, making reasonable compensation &c. To have, hold and enjoy, such liberties, licenses and authorities, and premises, for the term of twenty one years (determinable on lives), yielding, paying and delivering, during the said term, unto the plaintiff, within six weeks after the return or sale of every parcel of tin or tin ore gotten in the said premises, the clear sum of 1s. 4d. in the pound on the gross value, according to the price of the day, of all tin and tin ore which shall from time to time during the term be digged, raised and gotten out of, from and in the said premises; such 1s. 4d. in the pound to be paid clear from all returning charges, poor rates, (if any shall be payable), and all other rates and deductions whatsoever. Provided that on payment of the said sum of 1s. 4d. the plaintiff should allow the licensees a deduction of 4d., for the purpose of encouraging them in the working of the premises.

This lease still exists, and the subject-matter of the demise has been from its date and still is in the possession and occupation of the lessees, but they are not rated to the relief of the poor in respect of any occupation under the said lease. Considerable quantities of tin have been raised by the lessees, the whole of which has been disposed of and sold by them as and to whom they thought fit. The pay-

ment to the plaintiff has always been made in cash by the lessees.

The residue of the said 1516*l.*, viz. 216*l.*, is made up of the value of toll tin in respect of other mines in the parish, not included in the said lease, worked within tin bounds, and this last mentioned toll tin the plaintiff takes in kind from mines where the toll tin is laid out in kind. The other two thirds are not taken in kind, but the plaintiff receives the value of the ore in cash from the miners, who sell such ore on his account.

At the time of making the said rates, the plaintiff was not an inhabitant of the parish of St. Austell, nor had he any property in the parish, which would render him liable to be rated otherwise than as herein mentioned.

But whether or not &c.

Judgment in the Queen's Bench was entered up for the defendant without argument.

Sir *W. W. Follett* S. G. for the plaintiff in error (a). The question in this case is, whether the plaintiff is rateable to the relief of the poor in respect of the toll tin which he receives as representing Mr. *Smith*, the lessee of the Duke of Cornwall. The Court of Queen's Bench has decided (b) that the plaintiff is not rateable in respect of Buckler's mine. That decision, it is understood, the defendant does not intend to impugn. It follows, therefore, as the rate is joint, and the warrant of distress is joint, that the plaintiff is entitled to the judgment of the Court: *Mitward v. Caffin* (c), *Governor, &c. of Bristol Poor v. Wait* (d). [*Tindal* C. J. If the plaintiff is rated in too large an amount, that is matter of appeal. The other is the impor-

(a) The case was argued in Mich. Vac. 1841 (Nov. 30 and Dec. 8), before *Tindal* C. J., *Coltman* and *Maule* Js., and Lord *Abinger* C. B., and *Parke*, *Alderson* and *Rolfe* Bs.
 (b) 3 P. & D. 434.
 (c) 2 W. Bl. 1330.
 (d) 1 A. & E. 264; S.C. 3 N. & M. 359.

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tant point.] The mines from which the plaintiff receives the toll tin in question are in bounded lands. The plaintiff is not the owner of the mines, and the toll is payable not by contract, but according to the custom of the stannaries, and without reference to any interest in the land. In most of the cases which will be cited against the plaintiff, the party rated was lessor of the mine, and was said to have excepted out of the demise that portion of the ore which was payable to him.

The plaintiff is not an inhabitant of the parish to which he is rated, nor is he an occupier of any land within it. It will be found that in the cases, where it was first laid down that a person receiving, without risk, part of the ore from a mine was liable to the poor rate, the distinction between rateability as an occupier and as an inhabitant was not attended to. The first case of this sort was *Rowls v. Gells (a)*, where it was held that the lessee (under the crown) of lead mines was rateable to the poor for the profits arising from lot and cope, which were duties paid him by the adventurers, without any risk on his part. It does not appear in that case whether or not the party rated was an inhabitant, but it is clear that his liability was not put on the ground of his being an occupier, and it is equally clear that the distinction was then not thought of *(b)*. At that time a landlord, whether an inhabitant or not, would have been rated for his rent, if it had not been seen that, as his lessee had been rated for it before, the assessment would be double. It seems that *Rowls v. Gells (a)* was cited in *Rex v. St. Agnes (c)*, admitted by counsel to be a decisive authority, and pointedly approved of by Lord Kenyon C. J. But the report can hardly be correct, for shortly afterwards, in *Rex v. Parrott (d)*, Lord Kenyon C. J. is reported to have said, "This case differs from that of *Rowls v. Gells (a)*

(a) Cowp. 451.

Bur. 1341; S. C. 1 W. Bl. 389.

(b) The distinction was clearly present to Lord Mansfield's mind in *Lead Company v. Richardson*, 3

(c) 3 T. R. 480.

(d) 5 T. R. 593.

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in this respect ; that was the case of lead mines, which are not rateable under the statute of *Elizabeth*; and there the question was, whether or not the lessee was rateable for certain annual profits which he received without any risk on his part. Of the decision in that case, it is not necessary for me to say any thing at present ; I will form my opinion upon that question when it arises again." The cases of *Rex v. Nicholson*(a) and *Williams v. Jones*(b) raised the question distinctly, whether a person, who was not an inhabitant, could be rated for tolls or profits, unless they arose from real property, of which he was an occupier. In the former case it was held, that the lessee and occupier of an ancient and exclusive ferry, not being an inhabitant residing within the township, in which one of the termini of the ferry was situated, was not liable to be rated there for any share of the tolls of such ferry ; for that, supposing a ferry to be real property, it was not such real property as is mentioned in the stat. 43 *Eliz.* c. 2, the occupancy of which subjects the party to the relief of the poor of the place ; and that all the cases, where parties had been held rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy), had been where they at the same time occupied real visible property connected with their tolls in the place where they were rated. "Tolls," it was there said by Lord *Ellenborough* C. J., "do not come within any one specification of occupancy described by the statute : they are not lands nor houses, &c. If, therefore, the owner be taxable for them at all, it must be as an *inhabitant* of the parish out of which they arise." And *Rex v. Cardington* (c), where a person had been held rateable for the tolls collected at a sluice, though he did not reside in the parish, was thus distinguished by his lordship—"In the case of *The King v. Cardington* (c), the rate was specifically upon the sluices, on that which was local and visible property, and producing profit within the parish ;" and *Bayley* J. added, "In *The*

(a) 12 East, 330.

(b) 12 East, 346,

(c) Cowp. 581,

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King v. Cardington (a) the party was rated for the sluice of which he was the *occupier*, which sluice was real property." *Williams v. Jones* (b) was to the same effect. *Rex v. Baptist Mill Company* (c) appears to be the first case in which the attempt was made to support *Rowls v. Gells* (d), on the ground that the party rated was the *occupier* of the lot and cope which was paid him. The point decided in *Rex v. Baptist Mill Company* (c) was, that the lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated to the poor as occupiers of land. It is strange that it did not occur to the Court, that the person whom they considered an occupier in such cases, could in truth, if an occupier, be the occupier of nothing else than such a mine as was not within the statute of *Elizabeth*; for by that statute coal mines only are rateable. The absurdity therefore follows, that the lessees and adventurers of a tin mine, who receive the bulk of the ore, are not rateable, because they do not occupy any description of mine within the statute, and that the receiver of toll tin, who receives only part of the ore, is rateable because he is an occupier within the statute. In *Rex v. Bishop of Rochester* (e), the ability to maintain trespass for any injury done to the property is put as the test of occupation. Could the plaintiff in this case maintain trespass *quare clausum fregit*, as an occupier in respect of his toll tin? He certainly could not; he is not entitled to his toll until after the ore has been severed from the realty and has become personal property. [Lord Abinger C. B. A landlord receiving part of his rent in corn is not an occupier.] In *Rex v. Earl Pomfret* (f) it was held, that the owner of a lead mine, who had leased it and reserved, as duty lead, one-fifth of the lead to be smelted from the ore, was not rateable, because he had not reserved any part of

(a) Cowp. 581.

(b) 12 East, 346.

(c) 1 Mau. & S. 612.


(d) Cowp. 451.

(e) 12 East, 353.

(f) 5 Mau. & S. 139.

the ore in its natural and primitive state. But how could it affect the question of occupation, whether the ore was smelted or not? Yet in *Rex v. St. Austell* (a) the landlord was held rateable as an occupier of land, because the ore which he had reserved was not to be smelted, but merely to be "picked, worked, &c. or otherwise made merchantable." But the authority of *Rowls v. Gells* (b) seems to have been much shaken in *Rex v. Tremayne* (c). The question there was, whether the owner of the soil, who had granted to adventurers liberty to dig for manganese, rendering him 1*l.* 15*l.* for every ton of manganese raised by them, was an occupier of the soil, and rateable to the relief of the poor. It was held that he was not rateable, and *Parke J.* observed in his judgment, "It is said that no interest in the land passed, but a mere authority to the grantee to dig. That may be so, and in that respect the case resembles *Rex v. St. Austell* (a); but then it would follow that *Tremayne* (the owner) is himself the occupier by his agents; and, if so, as the owner of mines, he is exempt from rateability by the statute of *Elizabeth* and the nature of the property, and he could not be rated unless for dues." The last case on the subject is *Rex v. Todd* (d), where a landlord was held rateable who had reserved one-fifth of the lead ore, well cleansed and made merchantable, and fit for the smelting mill. He also cited *Rex v. Fryer* (e).

The objection to the rate in question is, 1. That the plaintiff was not an occupier at all. Even according to the decisions which appear adverse to him he was not an occupier, for he had no ownership of the mine, and cannot be said to have demised the bulk of the ore, and excepted part, of which he is still to be deemed the occupier, for he is a stranger to the land altogether, and the ore rendered him is rendered by custom, and is altogether irrespective of any interest in the land. 2. If he is an occupier he is occupier

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(a) 5 B. & Ald. 693; S. C. 1 D. & R. 351.

(b) Cowp. 451.

(c) 4 B. & Ad. 163; S. C. 1 N. & M. 194.

(d) 4 P. & D. 335.

(e) 4 B. & C. 961, n.

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of a tin mine, which is not the subject of rateability within the statute of *Elizabeth*.

Erle contrà. The plaintiff is occupier of land in the parish where he is rated. The Duke of Cornwall, whom the plaintiff represents, is owner of the soil, and the toll tin is paid him in respect of such ownership. The bound owner has merely a qualified right of entering the soil for the limited purpose of getting the ore. The bound owner's right of digging for tin would not enable him to maintain ejectment or trespass quare clausum fregit. The owner of the land has a right to enter and take all the profits of the upper surface, and also all other profits, provided he do not interfere with the bound owner's special right to take the tin; and, if the land owner did so interfere, the bound owner could not bring trespass of any sort against him, but would be confined to an action on the case, for disturbing the customary right of searching for tin. The interest of the owner of the toll tin is an interest in the ore, or a portion of it, which remains in him after his general rights as a land owner have been qualified by the bounding of the land, and is an interest therefore in the ore before it is severed, as well as afterwards.

From the time of Lord *Mansfield* C. J. to the present time, the authorities have been uniform, that the person who receives, without risk, part of the native mineral from the adventurers in the mine, is rateable. Besides the cases already referred to, in which *Rowls v. Gells* (a) has been acted upon, it was the foundation of the judgment in *Lord Bute v. Grindall* (b), where Lord *Bute* was held rateable as an occupier for certain profits of land appertaining to his office of ranger; and the cases do not indicate any distinction in such profits, whether payable by reservation in a lease or by custom.

But it is said that, if the plaintiff is occupier at all, he is occupier of a tin mine, which is not a rateable mine within

(a) Cowp. 451.

(b) 2 H. BL 265; S. C. 1 T. R. 338.

the statute of *Elizabeth*. If any reason can be assigned for the immunity given to mines other than coal mines, it must be that the adventurers in other mines are subject to special risks. But the plaintiff is not a miner, and has no right whatever to mine for the tin. In *Rex v. Carlyon (a)*, where it was held that tithe of fish was rateable, it was said by *Buller J.*, "Supposing the fishermen are not rateable for the fish caught, the case of *Rowls v. Gells (b)* governs this. For, though the owner of the lead mines is not liable to be rated for them, yet his lessee, who runs no risk, is rateable in respect of the profits of lot and cope."

But, even if the plaintiff is not an occupier, it is not necessary that he should be a "resiant" to be brought within the meaning of the word "inhabitant" in the statute of *Elizabeth*. The case of *Rex v. Nicholson (c)* was incorrect in laying it down that the statute used the words "inhabitant" and "occupier" in contradistinction; and, if the decisions of the Court of Queen's Bench, on the question of rateability to the relief of the poor, are to be reviewed from *Rowls v. Gells (b)* to the present time, the case of *Rex v. Nicholson (c)* may properly be included in the inquiry. Lord Coke, in 2 Inst. 702, on the statute of bridges, 22 Hen. 8, c. 5, observes, "although a man be dwelling in an house in a forraigne county, riding, city, or towne corporate, yet, if he hath lands or tenements in his own possession and manurance in the county, &c. where the decayed bridge is, he is an inhabitant, both where his person dwelleth and where he hath lands or tenements in his owne possession within this statute. Nota, habitatio dicitur ab habendo, quia qui propriis manibus et sumptibus possidet, et habet, ibi habitare dicitur." So in *Leigh v. Chapman (d)*, an occupier of land was held to be an inhabitant within the statutes of hue and cry. Why should it be supposed that the statute of *Elizabeth* used the words "inhabitant" and "occupier" in contradistinction to each other? The sta-

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(a) 3 T. R. 385.

(c) 12 East, 330.

(b) Cowp. 451.

(d) 2 Saund. 423.

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tute is full of tautology, or, at least redundancies, as "parson, vicar, and occupier of tithes impropriate, appropriations of tithes," "lands, houses." In Sir *A. Earby's* case (a) "inhabitant" is certainly used in the larger sense now contended for. But the statute does not apply merely to every "inhabitant, parson, vicar, and occupier," for it says, "inhabitant, parson, vicar and *other*;" and in *Rex v. North Curry* (b) the Court appears to have thought that, if it had been *res integra*, the words "and other" might have enlarged the class of persons liable to the poor rate. He cited also *Rex v. Manchester and Salford Water Works* (c).

Sir *W. W. Follett* S. G. The plaintiff does not represent the owner of the soil, for the Duke of Cornwall has transferred to him nothing but his interest in the toll tin.

Cur. adv. vult.

TYNDAL C. J. delivered the judgment of the Court. The question raised by the special verdict in this case is, whether the plaintiff, who was the lessee under the Duke of Cornwall of the toll of tin in the manors belonging to and parcel of the duchy, was rateable to the poor in respect of that toll.

The toll was a certain portion of the tin ore raised within tin bounds, and paid by the workers for tin in kind, without deduction or charge or risk to the receiver.

If the plaintiff was rateable, it is not material in this action of trespass to consider whether he was actually rated as the occupier of the toll of tin for a larger sum than he ought to have been: the sole question in this action being whether he was rateable in respect of the subject of the rate.

(a) 2 Bulst. 354.

(c) 1 B. & C. 630; S. C. 3 D. & R. 20.

(b) 4 B. & C. 953; S. C. 7 D. & R. 424.

The Court of Queen's Bench in giving their judgment in favour of his liability, referred to the cases of *Rowls v. Gells* (a), *Rex v. St. Agnes* (b), *Rex v. The Baptist Mill Company* (c) and *Rex v. St. Austell* (d), and expressed their opinion that they were bound by the authority of cases so often and so deliberately considered whilst they remained unreversed by a Court of Error.

We feel that we are equally bound by the same authorities; and, important as it is in all branches of the law to abide by previous decisions, in none is it more important than in this. The rules which apply to the rateability of property are everywhere daily acted upon in the management of parochial affairs, and materially affect the value of estates. It would be extremely inconvenient, and indeed mischievous, to overrule a class of cases, which have been much discussed and sanctioned by many eminent judges, and which are now constantly acted upon, because we might not feel perfectly satisfied with the reasons assigned for their decision; and, if we could permit ourselves to disregard these authorities on that account, we might feel disposed, on the same ground, to reject others, which have put a construction on the statute of the 43 *Eliz.* which we should be by no means sure that it ought to bear, if we were now for the first time called upon to explain the meaning of its language; which would seem to have been framed with a view to render rateable all occupiers of every description of real estate; and it might be very questionable whether occupiers of mines of any description were exempt. But we think it wiser to abstain from the discussion of such questions, and to abide by the construction which numerous decisions have given to the words of the statute, and which has been for a length of time constantly acted upon; and, according to these decisions, whilst we must hold that the occupier of every mine, except coal mines, is exempt, we feel our-

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(a) Cowp. 451.

(c) 1 Mau. & S. 612.

(b) 3 T. R. 480.

(d) 5 B. & Ald. 693; S. C. 1 D. & R. 351.

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selves equally bound to hold that he who receives a portion of the ore in an unmanufactured state is liable to be rated. The judgment must, therefore, be affirmed.

D.

Judgment affirmed.

Wednesday,
June 29th.

A writ of mandamus stated the formation of a poor law union, and that the Poor Law Commissioners had directed the guardians of the union to give directions to the overseers for the several townships and places to provide such sums as &c. The writ then stated an order of the guardians of the union, dated 27th August, 1838, to the over-

ROBINSON and another, Overseers of Todmorden Township (a), v. The QUEEN, on the Prosecution of The Guardians of the Poor of the Todmorden Union.

WRIT of error upon the judgment given for the crown by the Court of Queen's Bench.

Kelly took a preliminary objection that the writ of mandamus was defective (b), inasmuch as it did not distinctly state that, at the time the order was made, the defendants were the overseers of the township of Todmorden. The order was made 17th August, 1838. The admission in the return has reference to the later period, when the return was made, 30th March, 1839. The writ was tested 22d January, 1839. [*Alderson* B. The election is fixed by act

(a) See this case reported in Q. B., 4 P. & D. 553. There is there an error in the title of the case. Instead of "Todmorden Union" read "Todmorden Township."

(b) *Kelly* cited, to shew that this objection was open to the defendants after a return, *Rex v. The Margate Pier Company*, 3 B. & Ald. 220. See *Reg. v. Hopkins*, 4 P. & D. 550.

seers of T. to pay a sum of money. The writ was tested 22d January, 1839. The defendants made a return to the mandamus 30th March, 1839, admitting that "true it was that the guardians did require them, &c. overseers of T.:"—*Held*, that it sufficiently appeared on the proceedings that the defendants were the overseers of T. at the time of the order made by the guardians of the union.

On the formation of a poor law union, one parish altogether neglected to elect any guardian. There were two elections of guardians after the first, and at those also the same parish neglected to elect any guardians:—*Held*, that, even if at the first election the board of guardians was incomplete, the defect was cured by the 38th section of the Poor Law Amendment Act, which gives validity to a board elected subsequently to the first election, though the full number of guardians be not elected.

Semble, that the board was a good board even the first year.

of parliament.] Where there is no custom to the contrary : but, even so, non constat that the overseers in office at Easter, 1839, are those who were elected the previous Easter. There may have been vacancies by death. [*Alderson* B. Why is that to be presumed? Per *Tindal* C. J. and *Parke* B. The return by the defendants (a) makes it too clear for argument. It admits that they are the overseers whom the order required to pay the money.] *Kelly* then argued the points made below, on the same grounds that were urged there (b).

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Tomlinson appeared for the crown. The Court (c) intimated that they would hear him at a future day, if they thought it necessary.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.—In this case the question was the construction that ought to be put on the 38th section of the stat. 4 & 5 *Will.* 4, c. 76. The proviso of that section, it was contended, made it conditional to the validity of a union, that a guardian should be elected for every parish within it. But we are of opinion that the words of the proviso are directory only; but, supposing they are not, and that they import a condition, still the subsequent provisions of the section remove the difficulty, for the condition, if it be one, applies to the first election only, and the provision for the power of certain justices, as ex officio guardians, to carry the act into effect, applies only to a want of due constitution of the first board of guardians, or to a case of delay or irregularity of any election of guardians subsequent to the first. The case of the full number of guardians not being elected at a second or subsequent election, is expressly provided for by

(a) "We the overseers of, &c."
 "true it is that the guardians did
 require us as overseers of, &c."

(b) 4 P. & D. 553.

(c) Monday, June 20. *Tindal* C. J., *Coltman*, *Cresswell*, *Maule* Js., *Parke*, *Alderson* and *Rolfe* Bs.

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a part of the section enacting, "that in case the full number of guardians shall not be duly elected at such subsequent election of guardians for the time being, the other or remaining members of the said board shall continue to act until the next election, or until the completion of the said board,"—"as if the number of such board were complete." We are therefore of opinion that, this being the case of a subsequent election *de facto*, the judgment of the Court of Queen's Bench must be affirmed. A point made as to the identity of the overseers was disposed of in the course of the argument.

G.

Judgment affirmed.

END OF TRINITY VACATION.

I N D E X

TO THE

PRINCIPAL MATTERS.

ACCIDENTAL DEATH.

Jurisdiction of Coroner. See
CORONER.

ACCOUNT STATED.

See ATTORNEY.

ACTION.

Action by arbitrator for costs of
award. See ARBITRATION.

Against carrier, claiming the protec-
tion of 1 *Will.* 4, c. 68, in respect
of goods above the value of 10*l.*
See CARRIER, 1.

Action on a note given to a Friendly
Society, instead of summary pro-
ceeding before magistrate. See
FRIENDLY SOCIETY.

Action, instead of summary proceed-
ing, for tithes under the value of
10*l.* See TITHES.

Against broker, for delivering goods
without the price. See CASE.

By assignee of reversion, against
lessee, where lease not under seal.
See REVERSION.

For money had and received. See
MONEY HAD AND RECEIVED.

Party to action. See ARBITRATION,
CARRIER 2, and CORPORATION, 3.

ADMINISTRATOR.

Letters of administration from the
Archbishop of Canterbury are suf-
ficient to enable a person to sue
in this country on an indenture,
which, at the time of the intestate's
death, was in Ireland. *Whyte v.*
Rose. 312

ADMISSION.

By payment to Court. See PLEAD-
ING, 7.

AFFIDAVIT.

Where an affidavit was made by a
deponent who had been convicted
of subornation of perjury, the
Court made a rule absolute to
take it off the file of the Court.
In re Sawyer. 141

When affidavits may not be used.
See HABEAS CORPUS—VENUE.

Affidavit on motion for quo war-
ranto. See QUO WARRANTO.

AGENT.

See PRINCIPAL AND AGENT—AGENCY
OF CO-PARTNER IN DRAWING BILLS.
See PLEADING, 5—and BILLS OF
EXCHANGE.

AMBIGUITY.

In pleading. See **PATENT**.

AMENDMENT.

Quære, whether a judge at the trial can, in case of variance, make an amendment, which will have the effect of defeating a motion in arrest of judgment, or for judgment non obstante veredicto. *Atkinson v. Raleigh*. 611

Amendment of return to Habeas Corpus. See **HABEAS CORPUS**.

AMENDS.

Whether tender of amends cures bad notice of action. See **NOTICE**.

ANCIENT LIGHT.

See **PRESCRIPTION**, 3.

ANNUITY.

Action for money had and received to recover the consideration money of an annuity, which has been avoided on account of a defect in the memorial. See **MONEY HAD AND RECEIVED**, 2.

As to distress for. See **RENT CHARGE**.

APPEAL.

Appeal against order of removal. See **POOR**.

Notice and grounds of appeal against order of removal not removable by certiorari. See **CERTIORARI**.

Appeal from town council, to the Lords of the Treasury in compensation cases. See **BOROUGH**, 5, 6, 7.

APPRENTICESHIP.

See **POOR**, 37.

ARBITRATION.

An arbitrator may maintain an action on an express promise to pay him the costs of a reference.

The following allegation of the consideration of such a promise, "in consideration that the plaintiffs, at the request of the defend-

ants, would take upon themselves the burden of the said reference," was held sufficient on special demurrer to the declaration.

A declaration on a promise by the defendants to pay the arbitrators such costs, in such manner and at such times as the arbitrators shall direct, stated that the arbitrators awarded that the defendants should pay a certain sum as costs immediately after the execution of the award, whereof the defendants had notice.

Held, on special demurrer, that the award was to be construed to mean that the costs were payable within a reasonable time after the execution of the award; that they were payable on notice, and that it was not necessary that the declaration should aver a special request to pay.

A declaration stated that a cause was referred to the arbitrament of *A.* and *B.* and such third person as they should appoint, or of any two of them; that *A.* and *B.* appointed *C.*, of which the defendant had notice, and that in consideration that *A.*, *B.* and *C.* would take upon themselves the burden of the reference, the defendant promised to pay them their reasonable costs of the award, that they proceeded and made their award, ordering defendant to pay them their costs.

Held, that the three arbitrators could sue on this as a joint contract. *Hoggins v. Gordon*. 656

ARREST.

Whether defendant can avoid arrest under a ca. sa. by ruling the sheriff to return the writ. See **CA. SA.**

ARREST OF JUDGMENT.

Whether judge will amend, where the effect will be to cure pleadings bad in arrest of judgment. See **AMENDMENT**.

" ASSESSED."

Whether name of party assessed must appear on the assessment. See *POOR*, 33.

ASSIGNEE.

Of reversion. Action by, against lessee, where lease not under seal. See *REVERSION*.

Of bill of lading, whether liable for freight, as per charter-party. See *SHIPPING*, 2.

ASSIGNMENT.

Of all his effects by insolvent, for the benefit of all his creditors. See *INSOLVENT*, 1.

ASSUMPSIT.

Assumpsit or *Case*. See *CASE*.

Whether *assumpsit* lies by assignee of reversion against lessee, where lease not under seal. See *REVERSION*.

Assumpsit for freight as per charter-party against assignee of bill of lading, who accepts the goods. See *SHIPPING*, 2.

Assumpsit by arbitrator for costs of award. See *ARBITRATION*.

ASYLUM.

Right of appointing chaplain to lunatic asylum under 9 *Geo.* 4, c. 40. See *LUNATIC*.

ATTESTING WITNESS.

Signature of witness unable to write. See *SIGNATURE*.

ATTORNEY.

One partner of a firm of attorneys has no authority to make a promissory note in the name of the firm, though for money delivered to him in the course of business, to be invested by the firm on mortgage.

Quere, whether a note so given is evidence of an account stated by the firm with the payee.

The particulars of demand were, "this action is brought to recover the sum of, &c. due on the promissory note mentioned in the first count of the declaration. Above are the particulars of the plaintiff's demand, for the recovery whereof she will avail herself of the whole or any part of the declaration." *Semble*, the plaintiff is precluded from going into evidence on the count upon the account stated. *Hedley v. Bainbridge*. 483

AVOWRY.

As to part, and payment into court as to the residue. See *REPLEVIN*.

BANK.

Mode of taking out execution against the members of a joint stock bank. See *EXECUTION*, 2.

BANKRUPTCY.

Assumpsit for money paid.

Plea: the defendant's certificate under a fiat in bankruptcy, that the money was paid for a debt of defendant, due before his bankruptcy, for which plaintiff was surety, and that plaintiff paid the money without any request from the defendant, except the request supposed to arise by law from the premises.

Replication: that, before the payment, defendant had obtained his certificate, and that a final dividend had been made of his estate, and that there was not any debt in respect of the payment of which plaintiff could have proved, or for which he could have received any dividend.

On special demurrer to the replication,

Held, that the certificate was a discharge from the claim, as the principal creditor might have

proved, and, if he had, the plaintiff would have been entitled to the benefit of that proof, either in reduction of his liability to the creditor, if the creditor received the dividends, or by receiving the dividends himself, if he paid the whole debt to the creditor; or the plaintiff might have paid the debt at once to the creditor, and have himself proved before any dividend was declared; or, if the creditor would not take the debt, the plaintiff might have compelled him to prove for the plaintiff's benefit. *Jackson v. Magee*, 402. See PRINCIPAL AND AGENT.

Case for maliciously suing out fiat. See PLEADING, 10.

Stamp on sale of bankrupt's property. See STAMP.

BARON AND FEME.

Conversion by Wife. See TROVER.

BASTARD.

Settlement of. See POOR, 38.

BILLS OF EXCHANGE.

Agency, and notice of dishonour.

A. and B. and S. M., in 1832, assigned their stock in trade to trustees, who were to carry on the business in the name of "*S. M.*" alone, for the benefit of creditors. *S. M.* was employed by them as their agent, to carry on the business accordingly. *S. M.*, while conducting such business, carried on also a separate business of his own up to 1834. The plaintiff had been in the habit of discounting bills for the old firm of *A. and B. and S. M.*, and, after the assignment to the defendants, had been accustomed to discount bills indorsed in the name of "*S. M.*" for him in his private business, and other his private purposes, the proceeds of which *S. M.* had applied sometimes for carrying on the assigned

business and sometimes for his own private purposes. After he had ceased to carry on his private business, he indorsed bills in the name of *S. M.*, which the plaintiff discounted. *S. M.* applied the proceeds indiscriminately to his private purposes and to carrying on the assigned business. In an action on the bills against the trustees,

Held, that the signature of "*S. M.*" to the bills was *prima facie* their signature.

Held, also, that a notice of dishonour, given by the holder of a bill of exchange, need not inform the party addressed that the holder looks to him for payment.

But that it must inform him that the bill has been presented to the acceptor, and therefore that the following notices were insufficient:—

"Sir,—A bill (describing it) due yesterday, is unpaid, and I am sorry to say the person at whose house it is made payable don't speak very favourably of the acceptor's punctuality. I should like to see you upon it to-day."

"Sir,—*W. H.*'s acceptance (describing it) is unpaid. He has promised to pay it in a week or ten days."

"Sir,—A bill (describing it) lies due and unpaid at my house."—*Furze v. Sharwood*. 116

Attornies in partnership not agents for each other to accept bills, &c. See ATTORNEY.

Argumentative plea of non-acceptit. Agency of partner. See PLEADING, 5.

Re-issuing without fresh stamp, whether pleadable. See PLEADING, 3.

As to promissory note given to Friendly Society. See FRIENDLY SOCIETY.

See also PRINCIPAL AND AGENT.

BILL OF LADING.

Assignee of, his liability. See SHIPPING, 2.

BILL OF SALE.

By insolvent, when valid. See **INSOLVENT**, 2.

BONA NOTABILIA.

See **ADMINISTRATOR**.

BOROUGH.

Power of crown to grant charter of incorporation, and mode of procedure to question its validity. See **CORPORATION**, 1.

Indictment against corporation. See **CORPORATION**, 2.

Affidavit on information for quo warranto. See **QUO WARRANTO**.

Quo warranto when too late. See **QUO WARRANTO**.

Coroner's jurisdiction. See **CORONER**.

BURGESS.

1. *Who entitled to be.*

Under 5 & 6 Will. 4, c. 76, s. 9, which provides that no occupier shall be on the burgess roll, "unless he shall have been rated in respect of such premises so occupied by him to all rates made for the relief of the poor of the parish wherein such premises are situated, and unless he shall have paid all such rates, including therein all borough rates, if any, directed to be paid under the provisions of this act, as shall have become payable by him in respect of such premises," a party is not disqualified by nonpayment of rates assessed upon him under an old local paving and lighting act, the powers of which had been transferred from the statutory trustees to the corporate body under 5 & 6 Will. 4, c. 76, s. 75.

2. Nor, under another proviso of 5 & 6 Will. 4, c. 75, s. 9, "that no person shall be so enrolled in any year who within twelve calendar months next before the said

last day of August shall have received parochial relief, or other alms, or any pension or charitable allowance from any fund intrusted to the charitable trustees of such borough," is he disqualified by the receipt of charity from the trustees (not being "trustees of such borough") of a charitable institution "for the use and benefit of poor housekeepers of the city not receiving parochial relief." *Reg. v. Mayor of Lichfield*, 10.

2. *Burgess List—Penalty on Overseers for not Signing.*

An omission by an overseer, whether wilful or not, to sign the burgess list, required by the stat. 5 & 6 Will. 4, c. 76, s. 15, subjects each overseer so neglecting to the penalty imposed by section 48.

Where the parish consists of several wards, a signature by one overseer of a list of the persons entitled to be on the burgess list for his own ward only, is not a sufficient compliance with the statute to exempt him from the penalty for not signing the list for the parish. *King v. Share*, 453.

3. *Who disqualified from being.*

A lease by the mayor, aldermen and burgesses, whether made before or after the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) is a contract by or with the "council," within the 28th section, and disqualifies the lessee for the office of town councillor. *Reg. v. York*, 105

Town Councillor.

4. *When disqualified to be a relator in quo warranto.*

Held, that a town councillor was disqualified to be a relator on a motion for a quo warranto to question the validity of the election of

another town councillor, he having been conusant of the objection before the election, been present at the election, and having afterwards administered to him without protest the declaration required by statute 5 & 6 *Will.* 4, c. 76, s. 50. *Reg. v. Greene*, 24.

Jurisdiction of town council in compensation cases. See post, 5, 6, 7, 8.

5. *Compensation for loss of borough offices.*

The town council of a borough under 5 & 6 *Will.* 4, c. 76, s. 66, has jurisdiction to determine the whole claim to compensation of a borough officer, who has been removed from office, and may pronounce not only on the amount to which he is entitled, but whether his office, or the tenure of it, was such, as to entitle him to any thing.

2. Where therefore the council determined that a removed borough officer had no claim to any compensation whatever, and stated that, in case their decision should be overruled on appeal to the Lords of the Treasury, they reserved the right of disputing the amount of the claim, *held*, that the council had not neglected to determine the claim so as to be bound to admit it, after the lapse of six months, under 5 & 6 *Will.* 4, c. 76, s. 66.

3. The Lords of the Treasury have no jurisdiction to determine the right of a borough officer to compensation, whether he has been removed for alleged misconduct or otherwise; they have jurisdiction as to nothing but the amount of compensation. *Reg. v. Mayor, &c. of Sandwich*, 28.

6. On a concilium upon a return to a writ of mandamus commanding the defendants to seal a bond for the amount of compensation to the prosecutor, awarded to him by the Lords of the Treasury, under the

statute 5 & 6 *Will.* 4, c. 76, s. 66, on the abolition of an office, the Court held the writ bad, because it appeared on it that the Lords of the Treasury had no jurisdiction, the defendants having disputed not only the amount of compensation, but the right to any compensation. *Held* that the Court ought to give the costs of the writ to the defendants. *Reg. v. Mayor, &c. of Newbury*, 109.

7. The town clerk of a borough had transacted the legal business of the corporation as charity trustee. He and his predecessors in office had usually transacted such business as incidental to their office. On the passing of 5 & 6 *Will.* 4, c. 76, he was removed from the office of town clerk, and subsequently the new charity trustees appointed under sect. 71, also removed him from their employment. The town council having awarded him compensation for the loss of his office of town clerk, but having refused compensation for the loss of his employment by the trustees, he appealed to the Lords of the Treasury, who awarded him compensation for such employment also.

Held, that the Lords of the Treasury had jurisdiction to award such compensation, because the transaction of the charity business formed part of the incidental profits of the office of town clerk, and the Lords therefore had entertained a question of amount only, and not a question whether the loss of any distinct office was a proper subject of compensation. *Reg. v. Mayor, &c. of Norwich*, 605.

8. *Held*, that the four attornies of the Sheriff's Court of York, who, before the passing of the Municipal Corporation Act, had a monopoly of the office of attorney in the said court, were not, on other attornies being admitted to practise in the court, by the operation of

that act, entitled to compensation ; because, although their office was an office of profit within 5 & 6 Will. 4, c. 76, s. 66, there had been no abolition of it, or removal from it, within the meaning of that section. *Reg. v. Mayor, &c. of York.* 580

BRIDGE.

1. *What is.*

It is not essential to a "bridge," in the legal sense of the word, that it should be a structure over water which flows at all times.

A structure, called "Swarkestone bridge," was 1275 yards long : at the eastern end were five arches, under which the river Trent flowed ; at the western end eight arches, under one of which a stream constantly flowed : the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge:—*Held*, that it was properly so described, and that the verdict was properly entered for the crown. *Reg. v. Inhabitants of Derbyshire.* 97

2. *Whether Land-owner or Occupier liable Ratione tenuræ.*

At common law the liability to repair bridges *ratione tenuræ* is thrown ultimately on the owner of land, as between him and the occupier, though primarily as far as the

public is concerned the occupier may be chargeable.

Where by certain acts of parliament it was provided, that the owners of certain lands, liable *ratione tenuræ* for the repairs of a bridge, might make rates on such lands for the more conveniently raising the fund necessary for such repairs, and the lessee of a portion of such lands covenanted with the owner to pay his rent "free and clear of and from any land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, then already taxed or imposed, or thereafter to be taxed or imposed upon the premises, or upon the lessor, property tax or duty only excepted."

Held, that the covenant did not extend to make the lessee liable to pay a rate imposed on the demised premises for the repairs of such bridge. *Baker v. Greenhill.* 435
As to lowering street to give requisite height to a bridge. See RAILWAY, 2.

BROKER.

Liability for delivering not according to contract. See CASE.

BURGESS.

See BOROUGH.

BYE-LAW.

Of Scriveners' Company. See COMPANY, PUBLIC.

CANTERBURY, ARCHBISHOP.
See ADMINISTRATOR.

CARRIER.

1. *His Liability.*

The 1 Will. 4, c. 68, s. 1, protects a carrier from liability even for gross negligence in respect of silks and the other goods therein enumerated,

above the value of 10*l.* unless, at the time of their delivery to the carrier, their value and nature are declared, and an agreement entered into to pay the extra charge for them, as provided by section 2. *Hinton v. Dibbin.* 36

2. Party to Action against.

Goods exceeding 10*l.* in price were verbally ordered of the plaintiff; no particular mode of carriage was specified, nor was there any evidence of any particular course of dealing between the plaintiff and vendee. The plaintiff afterwards forwarded the goods by the defendant, who was a common carrier. The goods were lost while in the defendant's custody:—*Held*, that the plaintiff was the proper party to bring an action for the loss of the goods, the property therein not having passed to the vendee. *Coates v. Chaplin.* 552

CA. SA.

Before execution of a ca. sa. against defendant, and before any satisfaction or compromise of the plaintiff's claim, the defendant ruled the sheriff to return the writ.

Admitted that the defendant had no right to rule the sheriff under these circumstances. *Daniels v. Gompertz.* 751

Second ca. sa. where first set aside. See EXECUTION, 1.

CASE.

A declaration stated that the defendant had been retained by the plaintiffs as their broker to sell certain goods and deliver the same, according to the terms of the contract, to such person as should become the purchaser. It then alleged that the defendant sold the goods to one P., and P. purchased at certain times of delivery, and the amount to be paid on delivery.

Held, that this amounted to an express contract by the defendant with the plaintiffs to deliver what he sold for ready money.

That the duty of the broker arose from his contract not to deliver but for ready money.

And that case was maintainable against the defendant for delivering without the price being paid. *Boorman v. Brown.* 793

Case against principal for misrepresentation of agent. See PRINCIPAL AND AGENT, 1.

CASE.

From Quarter Sessions, ordered to be restated. Sessions no jurisdiction without notice of his intention to proceed by one party to the other. See SESSIONS.

CERTIORARI.

Where the Court of Quarter Sessions have heard and determined an appeal against an order of removal, and refused to grant a case for the opinion of this Court, on an objection to the sufficiency of the examination, this Court will not grant a certiorari to bring up the examination, and the notice and grounds of appeal, for they are no part of the record of the sessions. *Ex parte Tollerton.* 533

CHAPLAIN.

Of county lunatic asylum, who is to appoint. See LUNATIC.

CHARTER OF INCORPORATION.

Scire facias the proper mode of questioning its validity. See CORPORATION, 1.

CHARTER-PARTY.

See SHIPPING.

CHURCH RATE.

See ECCLESIASTICAL LAW, 2.

COAL.

Measure of damages in trespass for taking away coal from a mine. See **DAMAGES**, 1.

COGNOVIT.

The stat. 1 & 2 *Vict.* c. 110, s. 9, which regulates the mode of taking cognovits and warrants of attorney, does not apply to the case of a consent in writing, by a defendant, that a judge's order may be obtained to permit the plaintiff to sign judgment, unless the debt and costs are paid within a certain time. *Thorne v. Neale.* 48

COMMISSION.

To examine witnesses. See **INTERROGATORIES**.

COMMITTAL.

Where warrant necessary. See **ESCAPE**.
Committal for contempt. See **HABEAS CORPUS**.

COMMON.

Prescription, computation of thirty years without interruption. See **PRESCRIPTION**, 2.
Competency of copyhold tenants, having commonable rights, to be witnesses. See **EVIDENCE**.

COMPANY, PUBLIC.

See **RAILWAY COMPANY**.

A bye law, made by a prescriptive company of the city of London (with power under letters-patent to make bye laws and fine for breach of them), that on the day of the election of the master and wardens of the company, in which the freemen had no voice, two of the freemen should provide a dinner for all the members of the company, and pay out of their own

pockets such expenses thereof as should be incurred beyond a certain sum allowed for the purpose, or be fined in default, is a bad bye law. *Scriveners' Company v. Brooking*; 419

Execution against members of joint stock company. See **EXECUTION**, 2.

COMPENSATION.

For loss of borough office. See **BOROUGH**.

COMPETENCY.

Of witness. See **EVIDENCE**.

CONDITION.

Where the making a new road is a condition precedent to a railway company entering upon an old road, they are indictable for so entering without first making the new road. See **RAILWAY COMPANY**, 3.

CONSIDERATION.

1. *Executed Consideration, Promise in respect of.*

Assumpsit. The declaration stated that heretofore, to wit, on the 29th September, 1840, in consideration that plaintiff, at the request of defendant, *had* bought of defendant a certain horse, at a certain price, to wit, 30*l.*, defendant promised plaintiff that the horse was sound and free from vice.

Held, in arrest of judgment, that the promise appeared to have been made in respect of a precedent executed consideration; that it must be taken to have been an express promise, but that no express promise on such a consideration, though executed at request, could extend beyond the promise which the law would imply while the consideration was executory; that at the time of sale the only implied promise was to deliver the horse

on request, and that after the sale, therefore, there was no consideration for the subsequent express promise of warranty. *Roscorla v. Thomas.* 508

2. Mode of stating Consideration.

An agreement between the defendant, who was the executor, and the plaintiff, who was the widow of a testator, recited that the testator had verbally declared his desire that his widow should have his dwelling-house, and then proceeded thus, "now these presents witness, and it is hereby agreed and declared, that in consideration of such desire" the defendant would convey the dwelling-house to the plaintiff, "*provided nevertheless, and it is hereby further agreed and declared, that the said, &c. (the plaintiff) shall pay to, &c. (the defendant) the sum of 1*l.* yearly, towards the ground rent payable in respect of the said dwelling-house, and other premises thereto adjoining, and will keep the said dwelling-house and premises in good and tenantable repair.*"

Held, that the stipulation as to the payment of the 1*l.* ground rent and the repair was not a mere proviso, and that it contained the real consideration for the defendant's promise to convey the dwelling-house.

That the consideration was good, because the 1*l.* being payable for the house and *other premises* also, and payable to the defendant himself, did not appear to be incident to the house, as a specific burden, for which the defendant was liable to any superior landlord, and so to be a mere diminution of the gift itself; and that, in declaring upon the agreement, the reference to the testator's desire was properly omitted, as being irrelevant to the consideration. *Thomas v. Thomas.* 226

CONSIGNOR.

Party to action against carrier. See CARRIER, 2.

CONSPIRACY.

To obtain goods by false pretences. See CRIMINAL LAW, 2.

CONTEMPT.

Committal for, conclusiveness of. See HABEAS CORPUS.

CONTRACT

Whether there is any between tenant, where lease not under seal, and assignee of the reversion. See REVERSION.

Contract to pay freight by assignee of bill of lading. See SHIPPING, 2. To pay arbitrator his fees. See ARBITRATION.

Contract by broker arising from the course of his employment. See CASE.

CONVERSION.

See TROVER.

CONVICTION.

Effect of quashing Conviction.

The 43 Geo. 3, c. 141, s. 1, which enacts, that in all actions against a magistrate "on account of any conviction, in case such conviction shall have been quashed, the plaintiff, besides the amount of any penalty which may have been levied, shall not be entitled to recover more than 2*d.*, nor any costs of suit whatsoever, unless it shall be expressly alleged in the declaration in the action, and which shall be an action on the case only, that such acts were done maliciously and without any reasonable and probable cause," does not protect a convicting magistrate from an action of trespass, although his conviction has been quashed, where he has acted without jurisdiction.

Where the convicting magistrate, under 52 Geo. 3, c. 93, sched. (L.), rule 13, which authorises a magistrate on information or complaint to him, to proceed to hear the same, was not the same magistrate who took the information:—*Held*, that he had acted without jurisdiction, and was liable in trespass, although his conviction had been quashed on appeal. *Jones v. Gurdon*. 133

COPYHOLD,

The lord of a manor on a grant of a copyhold tenement can neither add to nor diminish the ancient rent.

Where the lord of a manor, having a life interest only in the manor, granted, at a new rent of 2s., a portion of an entire tenement, the ancient rent for which entire tenement had been 10s. and two hens, the grant was *held* invalid against his successor.

Quære as to the right of the lord to sever the tenement, even if he had not varied the ancient rent. *Doe d. Rayer v. Strickland*. 278

Competency of copyhold tenants to give evidence for the lord. See EVIDENCE.

CORN.

As to distraining corn in stacks. See RENT CHARGE.

CORNWALL.

Rateability of toll tin to the relief of the poor. See POOR, 4.

CORONER.

1. The statute 2 & 3 Edw. 6, c. 24, which enacts that where a mortal wound is given *feloniously* in one county and death ensues from it in another county a coroner shall have jurisdiction to take the inquisition in the county where the death happens, does not apply to deaths arising from *accidental* injury:

2. Nor *semble* where death en-

sues in a *borough* from a felonious injury inflicted out of the borough.

3. Where death ensues in a borough from an accidental injury inflicted out of the borough, the borough coroner has no jurisdiction to take an inquisition either by common law or statute. (But see now the stat. 6 Vict. c. 12.) *Reg. v. Great Western Railway Company*. 773

CORPORATION.

See BOROUGH.

Mode of questioning Validity of Charter of Incorporation.

1. Under the statutes 7 Will. 4 and 1 Vict. c. 78, the crown may grant a charter of incorporation, though the petition for it be not actually signed by a majority either in persons or property of the inhabitant householders.

There having been a *de facto* grant of a charter of incorporation to a town within a county, and a *de facto* grant of a separate court of quarter sessions to it, the Court quashed a county-rate which included that town, and refused to entertain objections to the validity of the grant of quarter sessions; on the ground that the grant of the crown ought in such a case to be directly impeached by *scire facias*. *Reg. v. Boucher*. 737

Indictment against Corporation.

2. A corporation aggregate may be guilty of a misdemeanor by non-feasance,

And in such a case an indictment is maintainable against it in its corporate name. *Reg. v. Birmingham and Gloucester Railway Company*. 236

Action by individuals on deed purporting to be the deed of a corporation.

3. A declaration in covenant by A., B. and C. stated, that by indenture they demised certain premises

to the defendant for a term; that the defendant covenanted to yield up the premises in good repair at the end of the term. Breach, that at the end of the term he yielded up the premises out of repair.

The defendant on oyer set out the indenture, which appeared to be made between *A.* the master, and *B.* and *C.* the governors of a hospital of the one part, and the defendant on the other part. It stated that the "master and governors" had demised the premises to the defendant, and that the covenant in question was made with the said "master and governors and *their successors*;" and it also contained covenants by the "said master and governors, for themselves and *their successors*," and concluded thus, "In witness whereof the said master and governors have hereunto affixed *their common seal*." A seal, purporting to be a common seal, was affixed on the part of the lessors, and the deed purported to have been signed, sealed and delivered by the defendant.

The defendant then pleaded that the indenture was not signed by the plaintiffs or their agent, lawfully authorised by writing, and that there was no demise of the premises signed by them or their agent, lawfully authorised by writing.

Special demurrer to the plea, on the ground that it was an argumentative denial of the plaintiffs' right of action, and of the validity of the indenture of demise.

Held, That it appeared by the record that the lease was made by a corporation, and that no action could be maintained upon it in the names of the plaintiffs.

That, though the names of the members of the corporation were mentioned in the indenture, those persons, as individuals, could not

be considered as parties to it, because, independently of the form of the covenants and the concluding clause, "in cujus rei testimonium," the seal professed to be the seal not of individuals, but of a corporation.

Semble, that if the plaintiffs, as individuals, had appeared to be parties to the indenture, the want of execution by them would have been no answer to the action. *Cooch v. Goodman.* 159

COSTS.

On discharging a rule with costs, the practice of the Court generally is not to order them to be paid by any one not a formal party to the rule, without a separate application for the purpose.

Dict. The Court has a discretionary power to order costs to be paid by persons making affidavits in support of a motion, particularly attorneys in their professional character, but, if the claim for costs arises on the affidavits in answer, there must be a special application. *Reg. v. Greene.* 789

As to right of appeal, against order of removal after abandonment, in order to get costs. See *Poor*, 9, 10.

Costs of mandamus. See *Borough*, 6—MANDAMUS.

COVENANT.

Covenant by individuals where the covenantees appeared to be a corporation. See *CORPORATION*, 3.

Quiet enjoyment, covenant for, against the acts of persons claiming through covenantor, what is a breach of. See *QUIET ENJOYMENT*.

Covenant to pay rent free of parliamentary taxes, construction of. See *BRIDGE*, 2.

Covenant, when it amounts to a lease. See *MORTGAGE*.

Covenant to insure against fire, nominal damages. See *DAMAGES*, 2.

COUNTY.

Jurisdiction, where injury and death in different counties. See CORONER.

COUNTY RATE.

This Court will not inquire into the validity of an assessment to the county rate for the purpose of determining whether a charter of incorporation is legal. See CORPORATION, 1.

COURT.

What is a proceeding in Court within 3 & 4 *Vict.* c. 86, s. 23. See ECCLESIASTICAL LAW, 1.

CRIMINAL LAW.

What a criminal suit within 3 & 4 *Vict.* c. 86, s. 23. See ECCLESIASTICAL LAW, 1.

Indictment against corporation. See CORPORATION, 2.

Indictment against Railway Company for encroaching on old road, without first making new one. See RAILWAY COMPANY, 3.

Indictment for non repair of bridge. See BRIDGE, 1.

Indictment, bad for uncertainty. See SODOMY.

Mistrial, wrong venire. See VENIRE.
Coroner's jurisdiction, in cases of felonious homicide. See CORONER.

1. *Two indictments for one offence.*

Two indictments against the same defendant, the one for misdemeanor, the other for felony, had been removed into this Court. The Court refused to quash them upon an affidavit stating that they both related to the same transaction. *Reg. v. Stockley.* 728

2. *Conspiracy—false pretences.*

An indictment for a conspiracy to obtain goods by false pretences did not state whose property the goods

were, which it was the object of the conspiracy to obtain.

Held bad in arrest of judgment. *Reg. v. Parker.* 709

3. *Naval stores, unlawful possession of.*

An indictment, under the 39 & 40 *Geo.* 3, c. 89, alleged that *A.*, on the 19th day of May, 1842, not being a contractor, &c., had in his possession certain naval stores:—

Held, that the date given applied to the allegation that *A.* was not a contractor, as well as to the allegation that he had possession of the stores, and therefore that it was sufficiently averred that he was not a contractor at the time of such possession.

The offence charged in this indictment is not punishable with hard labour. *Silverides v. Reg.* 617.

4. *Erroneous sentence at Quarter Sessions—effect of reversal by this Court.*

Where a person has been erroneously sentenced at quarter sessions to imprisonment and hard labour, this Court, after reversing the judgment in error, has no alternative but to discharge the prisoner. *Silverides v. Reg.* 617

CROWN.

A charter of incorporation granted by, cannot be impeached indirectly by trying the legality of an assessment to the county rate. See CORPORATION, 1.

CUSTOM.

As to making pigs a deck cargo. See SHIPPING, 1.

Custom of London as to obstructing ancient lights. See PRESCRIPTION, 3.

As to providing dinner for one of the city companies. See COMPANY, PUBLIC.

DAMAGES.

1. *Measure of, in Trespass for taking Coal.*

In trespass for severing and carrying away coal from the plaintiff's mine, the proper measure of damages, in respect of the coal taken, is its value as soon as it existed as a chattel, that is, as soon as severed. *Morgan v. Powell.* 721

2. *For Breach of Covenant to insure against Fire.*

Plaintiff, a lessee under covenant to insure against fire in his own name and that of the lessor jointly, assigned to defendant, who covenanted to keep the covenants in the lease. The defendant having neglected to keep up a fire policy, which had been effected, the plaintiff effected a fresh one, but in his own name only. No fire happened. The plaintiff brought covenant against the defendant for neglecting to insure. Defendant pleaded payment of a farthing into Court.

Held, though the plaintiff had no claim to be indemnified specifically for the sum expended by him in effecting the fresh policy, the jury were at liberty to award more than nominal damages for the risk to which he had been exposed by the defendant's default. *Hey v. Wyche.* 569

3. *For False Return.*

See MANDAMUS.

DEED.

Execution of lease by lessee, assumed when. See RAILWAY COMPANY, 6.
Whether lease under seal, for more than three years, must be signed. See FRAUDS, STATUTE OF.

Deed when taken to be the deed of a corporation. See CORPORATION, 3.

DEFAMATION.

In answer to an inquiry as to the character of a governess, the defendant wrote a letter in which she said, "I parted with her on account of her incompetency, and not being ladylike nor good tempered." To this letter there was the following postscript: "May I trouble you, to tell her that, this being the third time I have been referred to, I beg to decline any further applications." In an action by the governess against the defendant for writing this letter, she gave evidence tending to negative the statement in it of her demerits, and she proved that previously the writer had recommended her as a governess. The judge directed the jury that the letter being an answer to an inquiry into the character of a servant, *prima facie* it was privileged, but that the letter itself and the facts proved were some evidence for them, that the writer was actuated by express malice, to rebut any inference of which the defendant might have given evidence to shew that the statement itself of the character was a true one, or that she believed or had reason to believe it to be a true one:—*Held*, that this direction was right. *Fountain v. Boodle.* 455

DEFENDANT.

When he may rule sheriff to return *ca. sa.* See CA. SA.

DEMISE.

See MORTGAGE—REVERSION—RAILWAY, 6—CORPORATION, 3.

DEPRIVATION.

For simony. See ECCLESIASTICAL LAW, 1.

DEVISE.

See SIGNATURE,

DINNER.

Legality of bye law as to providing a dinner for one of the city companies. See **COMPANY, PUBLIC.**

DISCLAIMER.

See **PATENT.**

DISTRESS.

Avowry as to part, and payment into Court as to residue. See **REPLEVIN.**

Distraint of hay, &c. in stacks. See **RENT CHARGE.**

Distress for land tax, whether a breach of covenant, for quiet enjoyment, limited to the acts of lessor and those claiming under him. See **QUIET ENJOYMENT.**

DRAINS.

Occupier bound to cleanse.

In case for a nuisance, occasioned by drains on the premises belonging to defendant and adjoining the premises of the plaintiff, the declaration alleged that the defendant was the *owner* and proprietor of the drains, and that he ought to have kept them cleansed, and have prevented the accumulation of filth from running into the dwelling-house of the plaintiff, but neglected to do so, whereby, &c.:—*Held*, after pleading over, that the declaration was bad, as it did not shew that the defendant was the *occupier* of the drains, and the nuisance was not shewn to be of a permanent or continuing character. *Russell v. Shenton.* 573

DRURY LANE.

Occupier of a private box liable to poor rate. See **POOR, 5.**

DUPLICITY.

See **PLEADING—PATENT.**

EASEMENT.

See **PRESCRIPTION—RAILWAY, 6.**

ECCLESIASTICAL LAW.**1. Simony.**

By 3 & 4 *Vict.* c. 86, s. 23, “no criminal suit or proceeding against a clerk for any offence against the laws ecclesiastical shall be instituted in any ecclesiastical court otherwise than is hereinbefore enacted.”

By sect. 25, “nothing in this act contained shall be construed to affect any authority over the clergy of their respective provinces or dioceses, which the archbishops or bishops of England and Wales may now according to law exercise personally and without process in court.”

Where, after the passing of the act, an archbishop, at his visitation, received a charge of simony against a clerk, and pronounced sentence of deprivation against him, and interdicted him from exercising his functions on pain of the greater excommunication:

Held, that the proceeding ought to have been conducted in the mode directed by the statute, because it was a criminal proceeding and in court, within the words of sect. 23, and was not within the reservation of sect. 25, because the power of depriving “personally and without process in court” did not belong to the archbishop before the statute; and this Court prohibited the archbishop from enforcing the sentence. *Reg. v. Archbishop of York.* 202

2. Church Rate.

A prohibition will go to the ecclesiastical court in a suit to enforce the payment of a sum under 10*l.*, due upon a church rate, where neither the validity thereof nor the

liability of the party to pay it is disputed.

A declaration in prohibition sufficiently discloses that they are not disputed, which alleges that the defendant appeared in the ecclesiastical court under protest against the jurisdiction, and afterwards protested against it, on the ground that the amount to be recovered was under 10*l.*, and that the validity had not been disputed by the plaintiff, as after such a proceeding in the ecclesiastical court he would be unable to contest the jurisdiction of the justices, by denying the validity of the rate or his liability to pay it. *Richards v. Dyke.* 493

See also ADMINISTRATOR.

EJECTMENT.

Without notice by mortgagee, redemise. See MORTGAGE.

ELECTION.

Who estopped from questioning. See BOROUGH, 4.

Election of guardians, where full number not elected. See POOR, 3.

Bye law of one of the London companies to provide dinner on day of election. See COMPANY, PUBLIC.

ERROR, COURT OF.

Effect of reversing the sentence of Court below, in criminal case. See CRIMINAL LAW, 4.

ESCAPE.

A debtor arrested in the country on mesne process brought himself by habeas corpus before a judge in town, by whom he was committed to the custody of the marshal of the Marshalsea. Shortly afterwards he filed his petition to the Insolvent Court for his discharge, under 7 *Geo.* 4, c. 57, and that Court ordered that he should be discharged as to the creditor's

debt, as soon as he should have been in custody fifteen months. On this he returned to the marshal's custody, and while there was brought by a habeas corpus cum causa before the Central Criminal Court, to plead to an indictment for perjury. He pleaded not guilty, and traversed to the next sessions; but, as he could not give bail as required, that Court committed him to Newgate, until discharged by due course of law. Subsequently he was bailed, whereupon the keeper of Newgate, without any fresh warrant, carried him back to the Marshalsea, where he was received by the marshal. After this, and before the expiration of the fifteen months, he escaped. In case against the marshal for the escape,

Held, that the defendant's charge ceased when he brought the prisoner before the Central Criminal Court, and that, as it had not been revived by any fresh warrant of commitment, the custody of the prisoner at the time of the escape was illegal. That the defendant therefore was not liable, and that his conduct in receiving the prisoner did not estop the defendant from saying that he had no right to detain him.—*Contant v. Chapman.*

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ESTOPPEL.

Against town councillor to question an election. See BOROUGH, 4.

Against gaoler to question the lawfulness of prisoner's committal. See ESCAPE.

EVIDENCE.

See INTERROGATORIES.

Copyhold tenants, having a commonable right over the waste of a manor, are not competent witnesses for the lord of a manor, lessor of the plaintiff, in an ejectment in which the contention is

whether the land in dispute is parcel of the waste of the manor. *Doe d. Pye v. Branwhite*. 654
 Affidavit by person incompetent from infamy. See AFFIDAVIT.
 Attesting witness. See SIGNATURE.
 Certified copies of vesting order, &c. See INSOLVENT, 1.
 Copy of order filed, on appeal against order of removal. See POOR, 19.
 Order of removal on inadmissible evidence. See POOR, 24.
 Derivative settlement, evidence of. See POOR, 32.
 Evidence of payment to induce jury to give no interest on bill of exchange excluded for want of a plea of payment. See PLEADING, 6.
 Evidence of payment not admissible under replication of never indebted. See PLEADING, 8.
 Insufficiency of stamp may be pleaded, when. See PLEADING, 3.
 Agreement to set-off of mutual debts does not support a plea of payment. See SET-OFF.

EXAMINATION.

See INTERROGATORIES.

Examinations, on which order of removal made, not removable by certiorari. See CERTIORARI.

EXCEPTION.

Exception, grant, reservation. See RAILWAY COMPANY, 6.

EXECUTION.

1. If a writ of ca. sa. is set aside for irregularity, the plaintiff is not bound to proceed by scire facias on the judgment, but may at once take the defendant again on a fresh writ of ca. sa.—*Merchant v. Frankis*, 473. See also CA. SA.
2. In order, under the statute 7 Geo. 4, c. 46, s. 13, to take out execution against members of a joint stock bank upon a judgment against a public officer, it is necessary to proceed against them by scire facias.

A suggestion only having been entered for that purpose, the Exchequer Chamber reversed so much of the judgment of the Court below as related to the award of execution.—*Ransford v. Bosanquet*. 324

EXECUTION OF DEED.

Presumed, when. See RAILWAY, 6.
 Whether non-execution by lessee, any answer to an action of covenant. See CORPORATION, 3.
 Execution of deed by Corporation. See CORPORATION, 3.

EXECUTOR.

See ADMINISTRATOR.

FALSE PRETENCES.

Name of party cheated must be stated in indictment. See CRIMINAL LAW, 2.

FALSE RETURN.

See MANDAMUS.

FELONIOUS HOMICIDE.

See CORONER.

FI. FA.

Variance from incipitur, as to the amount to be levied. See JUDGMENT.

FIRE.

Measure of damages for not insuring according to covenant. See DAMAGES, 2.

FISHERMAN.

See POOR, 37.

FOREIGN COUNTRY.

Ireland, when so considered. See ADMINISTRATOR.

FRAUDS, STATUTE OF.

Quere, whether it is necessary by the Statute of Frauds, that a lease un-

der *seal*, for more than three years, should also be *signed*.—*Cooch v. Goodman*. 159
As to goods above the value of 10*l*. See CARRIER, 2.

FREIGHT.

Assignee of bill of lading, to what extent liable to pay freight. See SHIPPING, 2.

FRIENDLY SOCIETY.

Under 5 & 6 *Will.* 4, c. 23, s. 8, no action is maintainable by the treasurer for the time being of a friendly society, upon a note given him to secure a loan from the society, but his sole remedy is by proceeding before a magistrate, as therein directed. *Timms v. Williams*. 621

GAME.

See CONVICTION.

GRANT.

Easement, reservation, exception, way-leave. See RAILWAY COMPANY, 6.

GUARDIANS.

Full number not elected. See POOR, 3.

HABEAS CORPUS,

Ad faciendum, &c. See INSOLVENT, 3.

Ad Subjiciendum, &c.

1. The Court will allow the return to a habeas corpus *ad subjiciendum* to be amended even after it is filed, and without the consent of the prisoner.

2. Where the return was that the prisoner was committed to custody "upon the following order," and then set out an order purporting to be an order of the Master of the Rolls committing the prisoner for contempt, it was objected that the return did not state that the

order was in fact made by the Master of the Rolls.

The Court allowed the return to be amended by striking out the words "the following order," and substituting "by an order of the High Court of Chancery, made by the Right Hon. *Henry Langdale*, of which the following is a copy."

3. Where the return set out an order of the Master of the Rolls stating that the prisoner was brought to the bar of the Court of Chancery and committed for contempt, the Court would not allow the prisoner to use affidavits to show that he had not been brought to the bar of the Court, and so was entitled to his discharge under 11 *Geo.* 4 and 1 *Will.* 4, c. 35, s. 15, rule 5.

4. This Court takes judicial notice that the Master of the Rolls is a judge of the Court of Chancery. *Ex parte Clarke*. 780

HARD LABOUR.

Person illegally possessed of naval stores, not liable to. See CRIMINAL LAW, 3.

HAY.

Distress on hay in stacks. See RENT CHARGE.

HIGHWAY.

See RAILWAY COMPANY, 2, 3.

HOMICIDE.

Jurisdiction of coroner. See CORONER.

HUSBAND AND WIFE.

Conversion by wife. See TROVER.

ILLEGALITY.

Of intention, where act itself lawful. See RAILWAY COMPANY, 16.

In encroaching on highway, where conditions precedent not complied with. See RAILWAY COMPANY, 6.

INCIPITUR.

Not itself the judgment: variance between incipitur and fi. fa. See JUDGMENT.

INDICTMENT.

Against corporation. See CORPORATION, 2.

Two indictments for same offence. See CRIMINAL LAW, 1.

Against Railway Company for encroaching on old road without first making new one. See RAILWAY COMPANY, 3.

For non-repair of bridge. See BRIDGE, 1.

For indecent practices. See SODOMY. For conspiracy and false pretences. See CRIMINAL LAW, 2.

For being illegally possessed of naval stores. See CRIMINAL LAW, 3.

Mistrial, wrong venire. See VENIRE.

INFORMALITY.

Court will not grant mandamus to sessions to make special entry that order of removal has been quashed for informality. See POOR, 14.

INQUISITION.

To take lands. See RAILWAY COMPANY, 5. Super visum, &c. See CORONER.

INSANE.

Appeal against an order to remove lunatic pauper. See POOR, 16.

INSOLVENT.

1. *Voluntary Assignment.*

Under 1 & 2 Vict. c. 110, s. 59, a voluntary assignment of all his effects, within three months before the imprisonment of the assignor, is fraudulent and void, though made for the benefit of all his creditors.

Certified copies, upon parch-

ment, of the vesting order, and of the appointment of assignees, purporting to be sealed with the seal of the Insolvent Court, and to be certified by the deputy of the provisional assignee as follows—"G. C. Deputy for the Provisional Assignee, in whose custody such order is,"—are sufficient proof of such orders, without proof of the appointment of the deputy, either generally, or that he was deputy for the purpose of making such copies. *Jackson v. Thompson*. 598

2. *Bill of Sale.*

To a declaration in trover by the assignees of an insolvent, the defendant pleaded that before the insolvent's imprisonment he discounted for insolvent a bill of exchange payable one month after date, and that to secure payment of the bill the insolvent executed a bill of sale of the goods in question to the defendant, by which the insolvent covenanted that in case of his default in paying the bill of exchange the defendant should have the goods as his absolute property. The plea then stated that the bill of exchange was not paid when it became due, and that thereupon, and before the insolvent's imprisonment, the defendant took possession of the goods and converted them.

The plaintiff replied that the defendant had *sold* the goods *after* the insolvent's imprisonment had commenced, and relied upon 1 & 2 Vict. c. 110, s. 61, which enacts, that no person shall after the commencement of the imprisonment of the insolvent "avail himself" of any bill of sale given by the insolvent, "either by seizure and sale of the property of such prisoner, or by sale of such property theretofore seized," but that any person to whom any sum of money shall be due in "respect of such

bill of sale" may be a creditor for the same under the act.

Held, that the plea was good, as by the terms of the bill of sale the defendant had become absolute owner of the goods on the insolvent's failure to pay the bill of exchange before the imprisonment; and the sale, after the imprisonment, had been made by virtue of such ownership and not of the bill of sale, and, therefore, the defendant had not "availed himself" of the bill of sale within the meaning of the section. *Hunt v. Robins*. 646

3. *Habeas Corpus by Insolvent to remove himself to the Marshalsea.*

A prisoner in the debtor's prison for London and Middlesex, but not at suit of the plaintiff, petitioned the Insolvent Court, and inserted the plaintiff among others as creditor in his schedule. He afterwards obtained his discharge and the benefit of the act, as to all his creditors except the plaintiff, and he was to be entitled to his discharge and the benefit of the act as to the plaintiff's debt so soon as he should have been in custody at his suit, within the walls, and not within the rules of the prison, for seven months.

On the following day, while the insolvent was still in the same custody, the plaintiff sued out of the Queen's Bench a *capias ad respondendum* against him, which was lodged with the sheriff of Middlesex, who thereupon detained the defendant at the plaintiff's suit.

Held, that notwithstanding the adjudication of the Insolvent Court under 1 & 2 *Vict.* c. 110, the prisoner had the same right as before the statute of removing himself by *habeas corpus ad fac. et recip.* into the custody of the marshal of the Queen's Bench. *Samuel v. Nettleship*. 770

See also ESCAPE.

INSURANCE.

Against fire, damages in action of covenant for not insuring. See DAMAGES, 2.

Marine Insurance. See INTERROGATORIES, and SHIPPING, 1.

INTENDMENT

That lease executed. See RAILWAY, 6.

In favor of examinations of pauper, where left doubtful whether they were taken before one justice or two. See POOR, 22.

INTENTION.

Illegal intention not invalidate act legal per se. See RAILWAY, 6.

INTEREST.

Payment of bill of exchange cannot be proved, unless pleaded, for the purpose of inducing jury not to give interest. See PLEADING, 6.

INTERROGATORIES.

Where the defendant in an action on a marine policy applied for an order for the examination of witnesses in New Zealand, and it was not imputed that he made the application for the sake of delay, the Court refused to impose a condition that he should pay the money into Court, and also undertake to pay interest from the time of action brought, in the event of the plaintiff obtaining judgment. *Birnie v. Janson*. 630

INTERRUPTION.

Within meaning of Prescription Act. See PRESCRIPTION, 2.

IRELAND.

Bona notabilia in Ireland. See ADMINISTRATOR.

IRREGULARITY.

Second ca. sa. where first set aside for irregularity. See **EXECUTION**, 1.

JOINT STOCK BANK.

See **EXECUTION**, 2.

JUDGMENT.

The incipitur is not itself the judgment, but merely instructions for entering the judgment.

Where therefore, in the judgment roll, the sum stated to be recovered agrees with the sum for which the fi. fa. issues, the fi. fa. cannot be set aside, because it is for a less sum than is mentioned in the incipitur. *King v. Birch*. 513
Whether judge can amend so as to defeat motion in arrest of judgment. See **AMENDMENT**.

JUDICIAL NOTICE.

Of the boundaries of the city of London. See **VENUE**.
As to the Master of the Rolls being a judge of the Court of Chancery. See **HABEAS CORPUS**.

JURAT.

Intendment, where jurat to examinations of pauper left it doubtful whether they were taken by one justice or two. See **POOR**, 22.

JURISDICTION.

See **CONVICTION** — **ECCLESIASTICAL LAW**.

JUSTICE OF PEACE.

See **CONVICTION** — **CRIMINAL LAW** — **ECCLESIASTICAL LAW**, 2 — **FRIENDLY SOCIETY** — **LUNATIC** — **NOTICE OF ACTION** — **POOR** — **SESSIONS** — **TITHES**.

LADING, BILL OF.

See **SHIPPING**, 2.

LANDLORD AND TENANT.

See **MORTGAGE**, **QUIET ENJOYMENT**, **REVERSION**.

Liability to repair bridge ratione tenuræ. See **BRIDGE**, 2.

Liability to clean drains. See **DRAINS**.

LAND TAX.

Distress for land tax due before lease, whether a breach of covenant for quiet enjoyment, without disturbance from lessor or those claiming under him. See **QUIET ENJOYMENT**.

LEASE.

Execution presumed. See **RAILWAY COMPANY**, 6.

Whether non-execution by lessor an answer to action of covenant. See **CORPORATION**, 3.

Whether covenant by mortgagee amounts to a re-demise. See **MORTGAGE**.

Rights of assignee of reversion against lessee where lease not under seal. See **REVERSION**.

Whether lease under seal for more than three years must be signed. See **FRAUDS**, **STATUTE OF**.

LIBEL.

See **DEFAMATION**.

LIGHT.

Custom of London to obstruct ancient lights. See **PRESCRIPTION**, 3.

LIMITATIONS, STATUTE OF.

1. A letter written before the expiration of six years from the accruing of the debt, containing the following passages, held to take the case out of the Statute of Limitations, " I do not desire that you or any one of my creditors should lose what I owe them ; on the contrary, it is very much my

wish, not only to pay my debts but interest upon them if I can. As you have mentioned to Mr. *Anderson* the Limitation Act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note to pay the amount that is due to you. To pay you now or within the year I am utterly unable. I really have not as you imagine received 600*l.* for," &c. "It is of course indispensable that the exact sums I owe you should be fixed, whether you accept my note or not." (The letter then stated several objections to the amount of the claim.) "Under these circumstances you will perhaps say what deduction you are prepared to make, and I shall be glad if it be such as will allow me, with justice to my other creditors, to give you my note for the amount, or, if it be possible, to borrow the amount from a friend, which I have a hope of doing, and wipe the account entirely out of your books. I will not close this letter without repeating that I am fully sensible and thankful for the forbearance you have shewn; but I cannot move a step in the way to give you satisfaction, and do justice to my other creditors, until the sum actually due to you be ascertained." *Gardner v. M'Mahon.* 593

2. Part payment after action brought will not take a debt out of the Statute of Limitations. *Bateman v. Pinder.* 790
3. Defendant, being indebted to plaintiff on two overdue bills of exchange, gave the following written undertaking, "In consideration of your not proceeding on the bills, I hereby debar myself of the Statute of Limitations in case of my being sued for the recovery of the amounts of said bills, and I hereby promise to pay them whenever my circumstances enable me to do so,

and I may be called upon for that purpose." In an action on the agreement where issue was joined on a plea of the Statute of Limitations:—*Held*, that the Statute of Limitations began to run as soon as the defendant became of ability to pay, although the plaintiff had no notice or knowledge of such ability, and had made no demand of payment. *Waters v. Earl of Thanet.* 166

LONDON.

Judicial notice of its boundaries. See VENUE.
Custom as to ancient lights. See PRESCRIPTION, 3.
Bye law of company to provide dinner. See COMPANY, PUBLIC.

LUNATIC.

By 9 *Geo.* 4, c. 40, ss. 30 and 32, an act for the regulation of lunatic asylums, the visiting justices have the power of appointing and dismissing the chaplain of the asylum. *Reg. v. Visiting Justices of the Middlesex Lunatic Asylum.* 300
Appeal against order for removing lunatic pauper. See POOR, 16.

MAGISTRATE.

See CONVICTION—CRIMINAL LAW—
ECCLESIASTICAL LAW, 2—FRIENDLY SOCIETY—LUNATIC—NOTICE (OF ACTION)—SESSIONS—TITHES.

MALICE.

See DEFAMATION.
Action for maliciously suing out fiat. See PLEADING, 10.

MANDAMUS.

The stat. 1 *Will.* 4, c. 21, s. 3, extends the provisions of the statute 9 *Ann.*, c. 20, to all writs of manda-

mus, and prosecutors are entitled by it to recover damages and costs for a false return, though they have no private or particular interest in the thing commanded to be done. The traverse and joinder of issue shew who are the prosecutors. *Reg. v. Fall.* 803

Mandamus to quarter sessions to make special entry of grounds of quashing order of removal. See *POOR*, 14.

Indictment for encroaching on old road without first making new one, instead of mandamus to make new road. See *RAILWAY COMPANY*, 3.

MANOR.

See *COPYHOLD*.

MARINE INSURANCE.

See *INTERROGATORIES*.—*SHIPPING*, 1.

MARSHALSEA.

Habeas corpus to change custody of prisoner. See *ESCAPE*—*INSOLVENT*, 3.

MASTER AND SERVANT.

Defamation in giving character of servant. See *DEFAMATION*.

METROPOLITAN POLICE.

See *NOTICE (OF ACTION)*.

MILK.

See *TITHES*, 2.

MINES.

Rateability of lessee of toll tin. See *POOR*, 4.

MISDEMEANOUR.

Indictment against corporation. See *CORPORATION*, 2.

MISDESCRIPTION.

Of parish, in order of removal. See *POOR*, 11.

MONEY HAD & RECEIVED.

1. The defendants carried goods for the plaintiff and lodged them in their warehouse. The plaintiff conceiving that they had agreed to charge nothing for the carriage, claimed to receive them without paying for it. The defendants made a charge of *5l. 5s.* The plaintiff applied again, and, on the same charge being made, stated that he considered it exorbitant, and also that he did not consider himself liable to pay anything. He afterwards applied a third time, and asked whether defendants persisted in detaining the goods until the whole charge was paid, and, on their answering that they did, he paid it under protest. He then brought assumpsit for money had and received, stating in his particulars that the action was brought to recover *5l. 5s.* paid to recover his goods, and which sum was paid under protest that he was not liable to pay the same, or any part thereof, or, if liable for some part, that *5l. 5s.* was an exorbitant charge. The jury found that the defendants were entitled to *1l. 10s. 6d.* for the carriage.

Held, that, under the circumstances, with reference especially to the defendants insisting on the entire charge of *5l. 5s.*, that the action lay for the overcharge, although the plaintiff had made no tender of the sum really due. *Askmole v. Wainwright.* 217

2. The grantee of an annuity, which had been avoided for a defective memorial by the administratrix of the grantor, brought an action against the administratrix to recover the balance of the consideration money. The declaration, in assumpsit for money had and re-

ceived to the use of the plaintiffs, alleged the money to have been had and received by the intestate.

Held, issue being joined on a plea on non assumpsit, that the consideration money did not become money had and received until the avoidance of the annuity by the administratrix, and that it was therefore not money had and received by intestate at all, and that the declaration was not supported by the facts. *Churchill v. Bertrand*.

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See also PRINCIPAL AND AGENT. 2.

MORTGAGE.

Ejectment without Notice, Covenant, Redemise.

By indenture of mortgage *A.* released premises to the mortgagee in fee, and demised to him certain other premises for years, provided that, if *A.* the mortgagor should pay the mortgage money on the 5th October next, the deed should be void; but, if the mortgagor should not then pay, it should be lawful for the mortgagee, after giving one month's notice, as after mentioned, to enter, and whether in or out of possession, to lease and sell. Covenant by mortgagee not to sell or lease until he had given one month's notice demanding payment and the mortgagor should have made default.

Held that, inasmuch as after the 5th October, the time, if any, during which the mortgagor was to hold, was uncertain, and there was no affirmative covenant that he should hold at all, this was a covenant only, and not a redemise to the mortgagor, and that on default by the mortgagor the mortgagee might, after that day, bring ejectment against him without notice. *Doed. Parsley v. Day*.

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MUNICIPAL CORPORATION.

See BOROUGH.—CORPORATION.

NAVAL STORES.

Indictment for illegal possession of.
See CRIMINAL LAW, 3.

NEGLIGENCE.

How far carrier protected by Carriers' Act. See CARRIER, 1.

NONFEASANCE.

Indictment against corporation. See CORPORATION, 2.

NOTICE.

Of Action.

Notice of action against a magistrate, within 24 *Geo. 2*, c. 44, s. 1, or against a policeman, within 10 *Geo. 4*, c. 44, s. 1, must state the place where the cause of action occurred.

A defendant is not, by tendering amends after notice of such action, precluded from objecting that the notice does not state where the cause of action occurred. *Martins v. Upcher*, and *Breese v. Jerdein*.
716, 720, n.

Of railway inquisition. See RAILWAY COMPANY, 5.

Of appeal against order of removal. See POOR.

Of dishonour. See BILLS OF EXCHANGE.

To quit, when unnecessary. See MORTGAGE.

Of intention to proceed at sessions, when this Court has directed a case to be restated. See SESSIONS.

Of ability to pay. See LIMITATIONS, STATUTE OF, 3.

OATS.

Distress on oats in stack. See RENT CHARGE.

OCCUPIER.

Whether owner or occupier liable to repair bridge. See BRIDGE, 2.
And to clean drains. See DRAINS.

OFFICE

Compensation for loss of borough office. See **BOROUGH**, 5, 6, 7, 8.

ORDINARY.

Proceedings for simony. See **ECCLESIASTICAL LAW**, 1.

OVERSEERS.

Penalty on, for not signing burgess list. See **BOROUGH**, 2.

OWNER.

Whether owner or occupier liable to repair bridge. See **BRIDGE**, 2.
And to cleanse drains. See **DRAINS**.

PARISH.

When proper to divide into townships, and consequences of such division upon the settlement of their poor. See **POOR**, 1, 2.

"PARLIAMENTARY TAXES."

Meaning of, in lease. See **BRIDGE**, 2.

PARTICULARS OF DEMAND.

See **ATTORNEY—SET-OFF**.

PARTNERSHIP.

Attornies in partnership no implied authority to accept bills for the firm. See **ATTORNEY**.

Authority of partners generally to accept bills for the firm. See **PLEADING**, 5.

PARTY TO ACTION.

See **CARRIER**, 2.

PATENT.

Under 5 & 6 *Will.* 4, c. 83, s. 1, the grantees of letters-patent may enter a disclaimer, though at the time of doing so he has parted with a portion of his interest in the patent.
A plea to a declaration for in-

fringing a patent alleged that "the invention was not, at the time of making the letters-patent, a new manufacture within this realm within the true intent and meaning of the act of parliament in that case made and provided." *Held*, on special demurrer, that the plea was bad for ambiguity, because it was doubtful whether the defence set up was, that the manufacture was not new, or that it was not within the statute 21 *Jac.* 1, c. 3, s. 5.

Seemle, that the plea might have been good, as containing an entire defence in one connected proposition, if the words in the last mentioned section, in favour of letters-patent, "of the sole working or making of any manner of new manufacture within this realm," had been embodied in the plea.—*Spilsbury v. Clough.* 17

PAVEMENT.

Taking up of, in public street, by railway company, in order to give requisite height to bridge without disturbing the railway. See **RAILWAY COMPANY**, 2.

PAYMENT.

Proof of agreement to set off mutual demands does not support plea of payment.

Evidence of payment under replication of *never* indebted inadmissible. See **PLEADING**, 8.

Payment of a bill of exchange cannot be proved unless pleaded, even for the purpose of inducing jury not to give interest. See **PLEADING**, 6.
Payment into Court in replevin. See **REPLEVIN**.

What payment into Court admits. See **PLEADING**, 7.

PERJURY.

Affidavit by deponent convicted of perjury. See **AFFIDAVIT**.

PLACE.

Notice of action must give place of grievance. See NOTICE.

PLEADING.

Assumpsit or case. See CASE.

Non assumpsit or non tenuit. See REVERSION.

Indebitatus assumpsit. See SHIPPING, 2.

Money had and received. See MONEY HAD AND RECEIVED.

Avowry as to part, and payment into Court as to residue. See REPLEVIN.

Pleading in cases of prescription under 2 & 3 Will. 4, c. 71. See PRESCRIPTION.

Duty, allegation of. See CASE.

Consideration. See CONSIDERATION.

Onus of pleading. See RENT CHARGE.

Set-off. See SET-OFF.

Uncertainty.

1. As to time.

To debt on bond, the defendant, after setting out the bond, which recited that *G.* had been appointed clerk to a banking company, and was conditioned for his fidelity while in the service of the company, pleaded that before any breach, "to wit, on the 1st January, 1836, *G.* was appointed manager; that the office of manager is different from that of a clerk, and the responsibilities greater; that *G.* did from the day and year aforesaid, cease to be clerk to the company, and that he performed the condition whilst he was clerk and before he was appointed manager.

Held, on special demurrer, that the plea was bad, because, the time of *G.*'s appointment as manager being immaterial and laid under a videlicet, the plea, if put in issue, might have been supported by proof that *G.* had been appointed manager on some day pre-

vious to the day mentioned, and that he ceased to be clerk on the day mentioned, or some subsequent day, so as to leave an interval between the appointment to be manager and the ceasing to be clerk, and therefore the plea did not show that *G.* ceased to be clerk when he became manager. *Anderson v. Thornton.* 502

2. Duplicity.

It is not necessary that a plea should contain two defences well pleaded, in order to be double; it is enough if it sets up two defences.

Plea, as to 11*l.* 3*s.* 6*d.*, parcel of a sum in an indebitatus count, that defendant accepted a bill drawn on him by plaintiff for that amount, on account of the said sum; that the plaintiff indorsed the bill to *B.* for a good consideration, who thence and to the time of commencing the action, was the holder thereof. The plea then added that, when the bill became due, the defendant paid *B.*, then being the holder of the bill, 5*l.* in satisfaction of so much of the bill, and that *B.* had commenced an action against the defendant for the residue.

Held, bad for duplicity. *Wright v. Watts.* 386

3. To a declaration on a bill of exchange, by the indorsee against the acceptor, the defendant pleaded that the bill was accepted for the accommodation of the drawer, and without any consideration for the acceptance; that after the acceptance it was negotiated by the drawer for his own use, and paid by him when it became due; and that afterwards it was re-issued by him without a fresh stamp, and indorsed to the plaintiff with notice of the premises.

Held, 1st, that the plea was not bad for duplicity, but contained one defence only, viz. the re-issu-

ing of the bill under the circumstances without a fresh stamp.

2nd, that the re-issuing the bill without a fresh stamp was a good defence, inasmuch as being an accommodation bill, which had been satisfied by the drawer, who was the party ultimately liable upon it, it was no longer a negotiable instrument, and could not be put into circulation again without a fresh stamp, as required by the 55 Geo. 3, c. 184, s. 19.

And 3rd, that it was a defence that did not arise only on the evidence, but might well be pleaded, inasmuch as the 19th section of the same statute inflicts a penalty on re-issuing a bill of exchange after it has been paid, and a bill re-issued contrary to such prohibition becomes void. *Lazarus v. Cowie.* 487

4. *How to be objected to.* A special demurrer for duplicity must point out in what the duplicity consists. *Smith v. Clinch.* 225

Ambiguity. See PATENT.

5. *Argumentative traverse.*

In assumpsit against two defendants, as acceptors of a bill of exchange drawn on them by plaintiff, one defendant, *C.*, pleaded that he and the other defendant were partners, and as such had accepted divers bills of exchange for partnership purposes; that the other defendant accepted the bill in question in the name of the co-partnership, in fraud of him, *C.*, and not for the partnership, but for his own private purposes, and without the consent of *C.* and that there never was any consideration or value received by *C.* for the acceptance or the payment thereof; and that the plaintiff, at the times of drawing and accepting the bill, had notice of all the premises.

Held, on special demurrer, that, as the plea alleged notice to the

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plaintiff, at the very time when the bill was accepted, the implied authority of his co-partner to bind *C.* by the acceptance did not exist as to the particular bill, that the plea contained no confession of the acceptance in fact, and was therefore bad as an argumentative traverse of the acceptance by *C.* alleged in the declaration. *Jones v. Corbett.* 308

6. *What must be pleaded specially—mitigation of damages.*

Where in assumpsit by payee against drawer of a bill of exchange, the defendant pleaded payment into Court of the amount of the bill against the further maintenance of the action, the rule of Trinity Term, 1838, applies to exclude evidence that the bill had in fact been paid before action, for the purpose of inducing the jury to give no interest, by way of damages, from the date of such payment. *Adams v. Palk.* 450

Pleading evidence. See *ante*, 3.

7. *Payment into Court, what it admits.*

In a count on a special contract the plaintiff declared that he was engaged as a newspaper editor "at a certain salary, to wit, 400*l.*," and claimed a quarter's salary as damages for dismissal without notice.

Plea, payment of 37*l.* 10*s.* into Court, and no damages ultra.

Replication of damages ultra, and issue thereon.

Held, that the precise sum of 400*l.* in the declaration was not in its nature material, and that, as it was laid under a videlicet, the plaintiff, if the contract had been denied, would not have been bound to prove the precise sum.

That the defendant, therefore, had not, by his plea of payment into Court, admitted a contract for the specific salary of 400*l.* *Cooper v. Blick.* 295

3 L

8. *Replication—nunquam indebitatus.*

Under a replication that the plaintiff "*never* was indebted in manner and form" as alleged in a plea of set-off, evidence of payment is inadmissible. *Stockbridge v. Sussams.*

591

9. *Demurrer.*

Demurrer for duplicity must point out the particulars of the duplicity. *Wright v. Watts.*

386

10. *What defects cured by verdict.*

In an action on the case for maliciously suing out a fiat in bankruptcy, the usual allegation in the declaration, as to the annulling of the fiat, is not put in issue by the plea of not guilty.

Quære, whether under 1 & 2 Will. 4, c. 56, the Court of Review has concurrent authority with the Lord Chancellor to annul a fiat.

A declaration for maliciously suing out a fiat, alleged "that it was duly ordered, to wit, by the Court of Review, then having competent power and authority in that behalf, that the said fiat should be and the same was then rescinded and annulled, and the proceedings on the said fiat were thereupon wholly ended and determined."

Held, after verdict, that the declaration was good, as, even if no one but the Chancellor could annul the fiat, evidence that it was annulled by him would have supported the general concluding allegation "that the proceedings were ended," which was independent of the preceding allegation as to the Court of Review. *Atkinson v. Raleigh.*

611

11. *Adding Pleas.*

A rule to show cause why pleas should not be added to those already pleaded, need not be drawn up on reading the rule to plead several matters, or the judge's or-

der upon which that rule was drawn up. *Smith v. Goldsworthy.*

189

Several pleas. See REVERSION.

POLICEMAN.

Notice of action, under Metropolitan Police Act. See NOTICE (OF ACTION.)

POLICY.

Marine Policy. See SHIPPING, 1.
Fire Policy, See DAMAGES, 2.

POOR.

PAROCHIALITY.

1. The parish of St. Andrew, Pershore, contains six districts, five of them being distinct chapelries, and each maintaining its own poor, independently of each other and of the rest of the parish. The remaining district is divided into St. Andrew's, Pershore, and the hamlet of Pensham. The parish of St. Andrew, apart from Pensham and the five chapelries, contains about 900 acres and about 1000 persons. Pensham contains about 700 acres and 150 persons. Pensham is separated from St. Andrew's by the river Avon, and is about a mile and a half from the church of St. Andrew. There is no church or chapel in Pensham, but its inhabitants have pews in the church of St. Andrew, and have immemorially contributed to the repairs of that church in the proportion of one-third. For forty years there had been one workhouse, situate in St. Andrew's, for the use of the poor of St. Andrew's and Pensham jointly; and the poor of the two divisions have been jointly and indiscriminately relieved as far back as could be traced previously to that period. The fund for their relief was raised by a contribution of two-thirds from St. Andrew's and one-third from Pensham. Or-

ders of removal had been made to and from Pensham as between Pensham and other places, but not as between Pensham and St. Andrew's. Pensham was separately assessed to the land tax. It had also its own collector of poor and county rates, its own constable and surveyor of the highway. St. Andrew's had two overseers and Pensham one.

Held, on a special case stating the above facts, and referring the question to the Court, with liberty to draw such inferences from them as a jury might, that Pensham was not a separate township from St. Andrew's, in respect of the maintenance of its poor, within the 13 & 14 Car. 2, and that it had and was in a condition to have the benefit of the 43 Eliz. c. 2. *Price v. Quarrell.* 632

2. In 1822, the pauper was born a bastard in one of the several townships in a parish, which had only one set of overseers for the common maintenance of its poor. Subsequently each of the townships had its own set of overseers for the separate maintenance of its poor:—*Held*, that the pauper had not gained a settlement in the township of his birth, so as to be removeable thereto from a foreign parish. *Reg. v. Tipton.* 92

UNION.

Guardians, Election of.

3. A writ of mandamus stated the formation of a poor law union, and that the Poor Law Commissioners had directed the guardians of the union to give directions to the overseers for the several townships and places to provide such sums as, &c. The writ then stated an order of the guardians of the union, dated 27th August, 1838, to the overseers of T. to pay a sum of money. The writ was tested 22d January, 1839. The defendants made a return to the mandamus 30th March,

1839, admitting that true it was that the guardians did require us, &c. overseers of T.:—*Held*, that it sufficiently appeared on the proceedings that the defendants were the overseers of T. at the time of the order made by the guardians of the union.

On the formation of a poor law union, one parish altogether neglected to elect any guardian. There were two elections of guardians after the first, and at those also the same parish neglected to elect any guardians:—*Held*, that, even if at the first election the board of guardians was incomplete, the defect was cured by the 38th section of the Poor Law Amendment Act, which gives validity to a board elected subsequently to the first election, though the full number of guardians be not elected. *Seemle*, that the board was a good board even the first year. *Robinson v. Reg.* 826

POOR RATE.

Rate good, though name of person rated do not appear on it. See *post*, 33.

Rateability.

Mode of rating railway company. See RAILWAY, 1.

4. The Duke of Cornwall's lessee of the toll of tin, payable in the ore to the duke, is rateable to the relief of the poor. *Crease v. Sawle.* 812
5. By 10 Geo. 3, c. 75, poor rates may be assessed for the parish of St. Martin, Westminster, "upon all and every person or persons who do or shall inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other buildings, tenement or hereditament, or any other person or persons who by law is or are chargeable to the relief of the poor."

Held, that the lessee for a term

- of years of a private box in Drury Lane Theatre was rateable. *Reg. v. St. Martin's in the Fields.* 426
6. In 1621, one-third of certain lands in an island were conveyed to C., in consideration of his inclosing and defending the whole island against the overflowing of the Thames. The lands so conveyed are called "third acre lands," and the other lands the "free lands." By 32 Geo. 3, c. 31, for the more effectually embanking the island, commissioners were empowered to tax the owners and occupiers of "third acre lands" to their full amount, and, if the sum raised therefrom should be insufficient, then to tax the "free lands."

On appeal against a poor rate, assessed upon an owner of a farm consisting of "third acre lands," the sessions granted a case, stating that the island formed part of several parishes, that the embankment tax raised from the appellant and other persons to whom "third acre lands" had passed, had for several years been equal to the rack rent or full annual value of those lands, that the appellant paid nothing for the purchase of the farm, and that the sum raised from him for the current and preceding years was 123*l.*

The case submitted to this Court the following question:—"Whether the said sum of 123*l.* ought to be deducted from the assumed gross rental, in estimating the annual or rateable value of the farm, in assessing the appellant to the poor rate?"

Held, that there was a beneficial occupation by the appellant, and that the said sum of 123*l.* ought not to be so deducted. *Reg. v. Vange.* 474

ORDER OF REMOVAL.

How addressed.

7. It is not necessary, where an order

is made on complaint of, and is addressed to officers of a township, that it should be stated that the township is one which maintains its own poor. *Reg. v. Rotheram.* 523

Absolute in Form.

8. The order may be absolute without reference to the provisions of 4 & 5 Will. 4, c. 76, s. 79. *Reg. v. Rotheram.* 523

Supersedes and Abandonment.

9. An order of removal was obtained on the 26th May, and served on the following day.

On the 13th of June the parish, which had obtained the above order, having discovered that the examination, on which it was made, was defective, obtained a fresh order of removal to the same parish on fresh examinations. This order, which was served the following day, contained notice of abandonment of the former order. The former order had not been executed by the removal of the pauper.

Held, that it was no ground of appeal against the second order, that, at the time of making it, the first order had not been discharged, countermanded, or abandoned, either by notice or by supersedeas. *Reg. v. St. Pancras.* 671

10. Although notice of abandonment of an order of removal has been given before removal of the pauper, and before entry of appeal, and an offer has been made to pay all reasonable costs, the parish to which the order was directed has nevertheless a right of appeal against it, for the purpose of getting the proper amount of costs ascertained by the sessions. *Reg. v. Townstall; Reg. v. Stayley.* 676
11. An order of removal cannot be superseded so as to oust the sessions of their appellate jurisdiction.

tion, after an appeal has been entered, though that was a mere entry for the purpose of respiting, and though no notice of appeal had been given before such entry and respite, nor until after the twenty-one days following the order of removal had elapsed, and the pauper had been removed to the appellants parish. *Reg. v. Brighthelmstone.* 88

Misdescription in.

12. Where the parish of "All Saints, Poplar," appealed against an order of removal made upon it by the description of "Poplar" only, the Court refused a certiorari applied for on the ground of such misdescription. *Reg. v. Justices of Buckinghamshire.* 560

Statement of inhabitancy in.

13. *Held*, on an order of removal being brought before this Court by certiorari, that the order sufficiently showed the jurisdiction of the justices by stating a complaint by the churchwardens and overseers of, &c. that the paupers have come to inhabit in and are chargeable, &c. and that upon examination of the premises taken before us, "we do adjudge the same to be true, and that the paupers are settled in," &c. *Reg. v. Rotherham.* 523

Quashing for Informality.

14. Although the quarter sessions have quashed an order of removal for informality, this Court will not grant a mandamus to them to make a special entry of their grounds for quashing it. *Reg. v. Justices of Lancashire.* 714

APPEAL.

Right of appeal notwithstanding abandonment of order. See *ante*, 9, 10, 11.

Second appeal against same order.

15. A special case from sessions stated that an appeal against an order of removal had been dismissed, and the order confirmed on the ground that no grounds of appeal had been given, the sessions refusing to hear or respite the appeal: that subsequently at the same sessions the sessions made another order on the usual motion, permitting an appeal to be entered against the same order. (The case did not state whether the sessions knew the second entry applied to the same order as to which the appeal had been previously dismissed.) That the appeal so re-entered came on for hearing at the next sessions, when it appearing that the order appealed against was the same order, the sessions considered that the said order of removal had been absolutely confirmed by the judgment of the previous sessions, and dismissed the appeal. The question for this Court was whether the sessions "were right in considering the order of removal as absolutely confirmed, and in dismissing the appeal:"—*Held*, that they had a right to dismiss the appeal. *Reg. v. Oundle.* 77

Notice of Appeal—Lunatic Pauper.

16. The notice of appeal against an order of justices adjudicating on the settlement of an insane pauper, under 9 Geo. 4, c. 40, s. 42, should be given to the clerk of the peace under section 54, and not, under section 46, to the justices who made the order. *Reg. v. Justices of Kent.* 152

Notice and grounds no part of record.

17. The notice and grounds of appeal are no part of the record of quarter sessions, and are therefore not removeable by certiorari. *Ex parte Tollerton.* 533
- Whether defect in grounds of appeal

may be supplied by reference to the examinations. See *post*, 31.

Generality of ground of Appeal.

18. A general ground of appeal, stating that the examination on which an order of removal has been made, "is bad on the face thereof," enables the appellants to object that the examination contains no sufficient statement of the pauper's residence in the appellant parish to show that he has gained a settlement there. *Reg. v. Flockton*. 664

Whether original order must be filed.

19. Where it is the practice of the sessions to allow an appeal to be entered against an order of removal, on filing a copy of the order, the jurisdiction of the sessions to try the appeal cannot be disputed on the ground that the copy has been taken as evidence without accounting for the original. *Reg. v. Townstall* and *Reg. v. Stayley*. 676

EXAMINATIONS.

No part of Record.

20. The examinations are no part of the record of quarter sessions, and are therefore not removeable by certiorari. *Ex parte Tollerton*. 533.

Insufficiency of, not affect jurisdiction of removing Magistrates.

21. Jurisdiction is given to magistrates to make an order of removal upon due *complaint* of inhabitancy and chargeability in the complaining parish, and statement of settlement in the parish removed to; and such jurisdiction does not depend upon the *facts* of such inhabitancy, chargeability or settlement.

The insufficiency, therefore of the examination, which is merely evidence of such facts, does not affect the jurisdiction of the magistrates, but merely shows they have come to a wrong conclusion.

This Court will not revise the conclusion of the removing magistrates, however erroneous it may be, when once their jurisdiction appears.

This Court, therefore, will not issue a certiorari to bring up an order of removal upon affidavits setting out the examination, although it may contain no evidence of inhabitancy or chargeability, if the order itself states a proper complaint of such inhabitancy and chargeability. *Reg. v. Justices of Buckinghamshire*. 560

Examinations held sufficient.

Jurat.

22. The examination on which an order of removal was made appeared in the body and in the jurat to have been taken before a single justice, the examination containing the words "the examination of *A. B.* taken before *me*, one of her Majesty's justices," &c. and the jurat containing the words "sworn before *me*, and *I* do hereby certify that the above examination was read over," &c. The examination was signed, however, by two justices.

The order was appealed against, and the ground of appeal was "the examination on which the order is founded is bad, inasmuch as, though signed by two justices, it *purports* to have been taken by one justice only."

The sessions held the objection good and quashed the order. But this Court, on a case stated, held, that as upon the face of the examination it was doubtful whether the examination *purported* to have been taken before one or two justices, and, as the ground of appeal did not object that the examination had not in fact been taken before two justices, the maxim "*omnia rite esse acta*," was fairly applicable, and quashed the order of sessions. *Reg. v. Silkestone*. 396

Statement of Inhabitaney.

23. An examination which states that it was taken at S., that the mother is of S., and that she and her three children, of the ages respectively of seven, three years, and one year, were poor and chargeable to S., sufficiently shows that they were inhabiting in S., so as to give the justices jurisdiction to remove them. (So held, not upon case stated, but on certiorari, which was afterwards considered to have issued improvidently, as the examinations, being no part of the record at sessions, are not removable by certiorari). *Reg. v. Rotherham.* 523

Examinations held insufficient.

As showing that removing magistrates acted on inadmissible evidence.

24. An examination stated an order of removal, unappealed against, from the respondent to the appellant parish. It did not state that the order of removal was produced before the removing magistrates, or that any evidence was given to show that it could not be obtained :—*Held*, that the examination was insufficient. *Reg. v. Mildenhall.* 86

Examinations and grounds of appeal held insufficient, as not containing all the essentials of the settlement alleged.

25. The examination of a pauper set up a yearly hiring, which was alleged to have taken place while the pauper was "single and unmarried."

Held, that it was consistent with this allegation that the pauper was, at the time of the hiring, a widower with children, and therefore that the examination did not show, as it ought to have done, that the pauper was within the description, given by 3 & 4 Will. 4, c. 11, s. 7, of a person capable of acquiring

settlement by hiring and service. *Reg. v. Wymondham.* 690

26. An examination of a pauper, stating "My indentures were assigned to G. W. of Flockton, with whom I went and resided with three or four years, when I left him," contains no sufficient averment of the pauper's residence in Flockton for forty days, because, even if "G. W. of Flockton" meant that G. W. was resident in Flockton at the time of the assignment, the examination did not show that he continued to reside there afterwards. *Reg. v. Flockton.* 664.

27. On a case from the quarter sessions it was held that the following examination did not show that either the pauper or her husband had resided in S. for forty days :—

"About sixteen years ago my husband and I went to live at a house in S., which I hired of, &c. for 11l. a year. My husband and I occupied it from that time till his death, which happened about nine years back. I have seen my husband pay rent for this house many times. He paid it at the house. I continued to occupy this same house until 1841, when I came to the house I am now residing in." *Reg. v. St. Margaret's, Rochester.* 669

28. An examination, in stating a settlement by hiring and service, stated that the pauper went to and served in the appellant parish for a year, as cow boy, at the wages of 50s., the sessions, subject to the opinion of this Court, found that residence sufficiently appeared :—*Held*, that it did not. *Reg. v. Stoneleigh.* 535

29. Grounds of appeal stated that the appellant parish was not the last place of settlement of the pauper's father, as in the examination stated, and also that he, in November, 1832, rented a house and orchard at Eatington, in the parish, &c., from &c., at the rent of 10l. a year, and upwards, for &c., "and occu-

pied the same under such renting or hiring from that time until Michaelmas, 1836, and paid the rent for the same, and also was assessed to and paid the poor rate for the same, during the whole of that time." Upon a finding of the sessions, subject to a case, that the grounds of appeal were sufficient, though residence was not stated:—*Held*, they were not sufficient, and the Court therefore quashed the order of sessions. *Reg. v. Old Stratford.* 82

30. An examination stated that the pauper's father gained a settlement by renting three tenements, at, &c. of three different landlords, and gave the names of two of the landlords, but not of the third.

The sessions held the examination bad for omitting the name of the third landlord.

This Court refused to interfere by mandamus to the sessions to hear the appeal.

The examination also alleged that the pauper gained a settlement in his own right by occupying two tenements, the one "at the yearly rent of 9*l.*," and the other "at the yearly rent of 1*l.* 1*s.* 6*d.*"

Held, that the examination did not show that the pauper had *rented* the tenements for a year at the said rents, and occupied them under such yearly hiring, within 5 *Geo.* 4, c. 57, s. 2. *Reg. v. Pontefract.* 700

Examinations held insufficient for want of particularity.

31. The examination of a pauper, after stating a settlement gained about twelve years since, on which he was removed from the parish of Stowford, proceeded thus, "I then went to Stowford, and lived with Mr. *Jackman* there under a yearly hiring for eleven months and a fortnight."

On appeal against the order of removal, the grounds stated were, "Because the pauper acquired a

settlement in the said parish of Stowford subsequently to that acquired by him in our parish. Because the pauper acquired a settlement in the said parish of Stowford by hiring with one Mr. *Jackman* from Lady-day, to the following Lady-day, and service under the same in that parish accordingly, subsequently to that acquired by him in our parish."

An objection, made on the trial of the appeal, that the appellants could not go into their case, because in their grounds they had not stated the time of the hiring and service, or the residence of the pauper in the respondent parish, was overruled by the sessions.

Held, on a case from the sessions, that their decision was wrong, and that the defect in the grounds of appeal was not supplied by reading them with the examination, as they did not state that the service alleged by them with one Mr. *Jackman* was with the same person who was described in the examination. *Reg. v. Stowford.* 390

Whether examinations and grounds of appeal may be construed together. See *ante*, 31.

SETTLEMENT.

Derivative Settlement.

32. An examination, on which an order of removal was founded, stated a derivative settlement from the father of the pauper in the appellant parish, and that on a former occasion the pauper's brother's wife had been removed on an order founded on an examination stating the same derivative settlement from the father, on which order the appellant parish had, without appeal, received the said wife. On appeal these facts were received in evidence, to show an admission by the appellant parish of the father's set-

tlement:—*Held*, that they were properly admitted for that purpose.

Reg. v. Sowe. 637

And see post, 36, 38.

By Renting Tenement.

Rating.

33. By 4 & 5 *Will.* 4, c. 76, s. 66, it is enacted, that "no settlement shall be acquired by occupying a tenement, unless the person occupying the same shall have been assessed to the poor rate, and shall have paid the same, in respect of such tenement for one year."

In the form of a poor rate the column headed with "name of owner" was filled up with the name of the owner; the column headed "name of occupier" was not filled up with any name. Pauper occupied the house so rated; the rate was demanded of him by the parish officer and pauper paid it.

Held, that he was sufficiently "assessed" to gain a settlement, though his name did not appear on the rate. *Reg. v. Hulme.* 682

By Hiring and Service.

34. Pauper, by written agreement, hired for four years as a servant in turning iron work, or any other employment as an artisan which his master might set him to, and promised to devote his whole time to such business during the usual working hours, from 6 A.M. to 6 P.M., and also to give a just account of all his doings in such business, whenever his master should require him, in consideration of weekly wages to be paid to him by his master; and his master, in consideration of such work, promised to pay him at and after the rate of 8s. a week.

Held, an exceptive hiring. *Reg. v. Holbeck.* 692

35. In 1828, when the 42 *Geo.* 3, c.

73, was the statute in force for the limitation of factory labour, pauper was hired in a factory. There was no express contract of hiring, but the pauper was engaged with reference to certain rules, by one of which the hours of attendance for each person engaged in the factory were stated to be from 6 A.M. to half-past seven P.M., excepting Saturday, when work was to cease at half-past four, half an hour allowed for breakfast, and one hour for dinner, and any person not coming to work at the stated periods for every offence to forfeit 6d., and be deducted for the time he should be absent.

Held, an exceptive hiring. *Reg. v. Preston.* 698

By Estate.

36. The derivative settlement of a child, whose father has acquired a settlement by virtue of the possession of an estate or interest in a parish, is not itself a settlement by virtue of such possession within 4 & 5 *Will.* 4, c. 76, s. 68.

Where therefore the father, and his emancipated child, removed more than ten miles from the parish, in which the father had gained a settlement by possession of an estate or interest:—*Held*, that the child did not lose his settlement by the above section.

Per Coleridge J. the child, if unemancipated, would have lost his settlement by the operation, not of the above section, but of the general law of settlement. *Reg. v. Hendon.* 394

By Apprenticeship to Sea Service.

37. An apprentice in the sea service, whose term of apprenticeship was running at the time of the passing of 4 & 5 *Will.* 4, c. 76, but who had previously served and resided so as to gain a settlement, retains his settlement, notwithstanding the

67th section, which enacts "that from and after the passing of this act no settlement shall be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise, nor by any person *now being* such an apprentice, in respect of such apprenticeship. *Reg. v. St. Giles.* 542

Settlement of Bastard.

38. By 4 & 5 *Will.* 4, c. 76, s. 71, a child born a bastard, after the passing of this act, takes, on the mother's marriage, the settlement of her husband. *Reg. v. St. Mary, Newington.* 686

PRACTICE.

See AFFIDAVIT—AMENDMENT—CA. SA.—INSOLVENT, 3—INTERROGATORIES—JUDGMENT—PLEADING, 11—QUO WARRANTO—REPLEVIN—REVERSION—VENUE.

PREROGATIVE.

Proper mode of impeaching a charter of incorporation. See CORPORATION, 1.

PRESCRIPTION.

1. *Computation of Thirty Years next before, &c.—Life Estate.*

In trespass, to a plea justifying under a profit à prendre, pleaded under the statute 2 & 3 *Will.* 4, c. 71, to have been enjoyed thirty years "next before the commencement of the suit," the plaintiff replied, that a life estate existed during part, to wit, twenty-seven years of the thirty years in the plea mentioned. Rejoinder, that the life estate did not continue during any part of the said thirty years. *Held*, under this issue, that though the life estate did in fact exist during part of the thirty years next before the suit, that the defendant was

entitled under the seventh section to exclude it altogether in the computation, and that he succeeded on the issue by showing an enjoyment of twenty-five years, and five years, the former before and the latter after the life estate.

A plea of enjoyment of a profit à prendre for sixty years is defeated by showing an unity of possession during part of the time. That may be shown on a traverse of the plea.

Unity of title is a *prima facie* case of unity of possession. *Clayton v. Corby.* 174

2. *Computation, &c.—Interruption.*

Where a right of common had been exercised by the tenants of a farm for more than thirty years before action, except for about two years in the middle of the period, when the landlord was in possession, who had no commonable cattle,

Held, that such non-user was not an "interruption" within 2 & 3 *Will.* 4, c. 71, and that it was correctly left to the jury to say whether the right had been substantially enjoyed for the full period of thirty years. *Carr v. Foster.* 753

3. *Ancient Light—Custom.*

Case for obstructing a window-light in the city of London by building.

Plea: that, by the custom of the city, the owner of a house on ancient foundations may at any time build on them so as to darken the window of his neighbour, though that also be ancient, unless there be some agreement to the contrary, and justification under the custom. Replication: under 2 & 3 *Will.* 4, c. 71, s. 3, of twenty years' enjoyment of the light.

Held, on general demurrer to the replication, that the custom of London was no defence. *Salters' Company v. Jay.* 414

PRETENCES, FALSE.

See CRIMINAL LAW, 2.

PRINCIPAL AND AGENT.

1. In an action on the case for a fraudulent representation of the value of a house, on a sale of the lease of it by the defendant to the plaintiff, it appeared that the defendant employed her attorney to put it in a course of being sold by auction. He described it to the plaintiff as being let for 100*l.* a year, clear of all rates and taxes, while in truth the defendant was to pay all rates and taxes. The attorney made this statement *bonâ fide* believing it to be true, but the statement was not authorized by the defendant, nor had the defendant herself made any representation on the subject.

On this representation the plaintiff bought the house, paying a larger price for it than he would have done, if he had known the fact that the defendant paid the rates and taxes:—*Held*, that the plaintiff was entitled to recover the difference of the value from the defendant. *Fuller v. Wilson*.

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2. On the 13th September, 1831, a bill of exchange in three parts was drawn on Messrs. B. & Co. at Calcutta, by J. S. at Birmingham, and indorsed by the payee to the plaintiffs. They transmitted the set of bills to their bankers in London, who indorsed it to R., who indorsed to the defendants. On the 30th September the defendants sent the first of the set of bills to A. & Co. at Calcutta, with a letter instructing A. & Co. "to do the needful and advise them thereof." In October the defendants forwarded the second and third of the set. A. & Co. received all three of the set, and on the 21st of April, 1832, pre-

sented the set of bills for acceptance, which was refused. It was duly protested for non-acceptance, and the defendants were advised by a letter, dated 28th April, of the dishonour. The protest was sent with the letter, but the bill was not returned. A duplicate of this letter was received by the defendants 3d November, 1832, but the original with the protest was not received till the 18th April, 1833.

On the day the defendants received the duplicate letter they gave notice of the dishonour to R., who gave notice to the plaintiffs.

A. & Co. at Calcutta, on the maturity of the bill, presented it for payment to the drawee, and, payment having been refused, sent to the defendants a letter, dated 27th July, expressing their regret that the defendants had given them no discretion in holding the bill, with a view to its being speedily paid by the drawee, and adverted to a letter which they had written to the drawee, regretting the necessity they were under of returning the bill, and at the same time observing that they would lose no time in remitting any sums he might think proper to pay them.

A. & Co. did not return the bill.

On the 31st July, 1832, A. & Co. wrote to the defendants, requesting instructions as to their mode of dealing with drafts on the same drawee, and stating, as to this bill, that they had retained it, with the original of the protest, in the expectation of its being paid, and they forwarded the duplicate protest and the third bill of exchange. This letter inclosed a copy of a letter from the drawee, stating his expectations of speedy payment.

Both the letters of A. & Co., that of the 27th July and that of the 31st July, were sent to the defendants by the same ship, and

were received by the defendants on the 10th of December following, and on that day they presented the third bill of exchange and duplicate protest to *R.*, who paid the amount with interest, exchange and re-exchange, and also received in due course the same from the plaintiffs.

On the 31st December, 1832, the defendants wrote to *A. & Co.* advising them of the receipt of the amount of the bill from *R.*

On the 12th September, *A. & Co.* advised defendants that they had received amount from the drawee. This advice reached the defendants 30th January, 1833; they advised *R.* of it, disclaiming for themselves any interest in it, and the same day also wrote to *A. & Co.* at Calcutta, disclaiming all right to the money received by them from the drawee.

A. & Co. became bankrupt on the 12th December, 1832.

Held, that *A. & Co.* were not the agents of the defendants in receiving the amount of the bill from the drawee.

Quære, whether, supposing the defendants to have received the amount of the bill twice, once for themselves from the prior indorser, and once by their agent from the drawee, they were liable to the plaintiffs in an action for money had and received to their use.

Rotton v. Inglis. 259

Agency of partners in accepting bills for each other. See ATTORNEY—PLEADING, 5.

PRISONER.

See ESCAPE—INSOLVENT, 3—CRIMINAL LAW, 3.

PRIVILEGED COMMUNICATION.

See DEFAMATION.

PROBABLE CAUSE.

See CONVICTION—PLEADING, 10.

PROBATE.

See ADMINISTRATOR.

PROHIBITION.

See ECCLESIASTICAL LAW.

PROMISSORY NOTE.

See FRIENDLY SOCIETY.

PROVISO.

Construed as substantive clause of agreement. See CONSIDERATION, 2.

PUNISHMENT.

Consequences of erroneous sentences where sentence reversed. See CRIMINAL LAW, 3.

QUARTER SESSIONS.

See SESSIONS.

QUIET ENJOYMENT.

Covenant for.

A distress upon demised premises for land tax due from the lessor before demise, is not a breach of his covenant that the lessee shall enjoy "without any disturbance, &c. of or by him, the defendant, his heirs or assigns, or any other person or persons lawfully claiming or to claim *by, from, or under him, or them,*" because the claim for land tax was a claim, not through him, but against him. *Stanley v. Hayes.* 411

QUIT.

Notice to quit unnecessary. See MORTGAGE.

QUO WARRANTO.

See BOROUGH, 4.

1. It is a sufficient compliance by a relator with the R. G. M. T. 3 *Vict.* to state in his affidavit that he has directed the application for the rule, that the motion *will* be made at his instance as relator, and that he shall be deemed relator, &c. *Reg. v. Anderson.* 113
2. Under special circumstances, the Court in the exercise of its discretion discharged a rule for an information in the nature of a quo warranto against a burgess, the application being made so late, that it would not be disposed of before another revision of the burgess roll would be had. *Reg. v. Anderson.* 113

RAILWAY COMPANY.

Mode of Rating Railway Company to Poor Rate.

1. The amount on which a railway, when the railway company are themselves the carriers, is to be assessed to the poor rate, is the rent which a lessee would pay, he being supposed capable of deriving from the use of the railway all the profits which accrue to the company from the conveyance of passengers, cattle and goods, under the powers of their acts, such lessee finding locomotive power, carriages, &c. and paying all expenses incidental to working the railway, free of all usual tenant's rates and taxes, and tithes commutation rent charge, and making allowance and deductions for the average annual cost of repairs, insurance and other expenses necessary to maintain the way, its fixtures and appurtenances, in a state to command such rent.
- And this principle applies, though the railway acts contain clauses that, if themselves are the carriers, they shall keep an estimate or account of the tolls which would

be payable on the same amount of traffic, supposing it to be conducted by other parties, and that they shall, under heavy penalties, allow the parish officers to have access to such account or estimate.

With regard to the rating in a particular parish, the line is to be rated not in the proportion which the length of the line therein bears to the whole line, but in the proportion that the receipts in such parish for traffic bear to the receipts throughout the whole line. *Reg. v. London and South-Western Railway Company.* 49

Encroachments by Railways on Public Roads.

2. By sect. 9 of the Eastern Counties Railway Company Act, they are empowered to raise or lower any ways the more conveniently to carry the same over or under the railway. By sect. 100, where any bridge is erected across any public carriage road, not being a turnpike road, there is to be a clear height from the surface of the carriage road to the centre of the arch of the bridge of not less than 16 feet.

By sect. 120, nothing in the act is to derogate any of the rights or privileges of any parish, over which the railway shall pass, acting under any local act.

Held, that, the railway having been carried over a street by means of a bridge, which, for the convenience of the railway levels, left a space from the arch of the bridge to the street below, of 15 feet 1 inch only, the company had a right to lower the street in order to give the height required by the statute, notwithstanding that the street was under the control of commissioners by a local act (12 *Geo. 3*, c. 38), which enacted, that "no person shall alter the form of any pavements which shall be now made by virtue of this act, without the con-

sent of the commissioners or in anywise encroach thereon, or put up any posts, boards, &c." *Reg. v. Eastern Counties Railway Company.* 1

3. The Manchester and Leeds Railway Company were empowered by statute to divert the course of roads, and raise, sink, or deepen them. By a separate section it was enacted, that where in exercise of their powers it should be found necessary to raise, sink, &c. a road, so as to make it impassable or inconvenient, they should, before any such act, cause a sufficient road to be set out as convenient as the road cut through, or as near thereto as might be. The company having encroached on an old road without making a new one, *held*, that they were indictable for a nuisance, and that it was no answer to that indictment that the state of the earth rendered it impracticable to make a new road. *Reg. v. Scott.* 729

Compulsory Purchase Clauses.

Whether Company bound to purchase whole Property, where Part within certain Distance.

4. By sect. 46 of the London and Greenwich Railway Act (3 & 4 Will. 4, c. xlv.), if the company wish to buy *part* of certain "properties" therein mentioned, they cannot compel a sale unless they buy the whole of such "properties."

By sect. 47, the owner of any "house, manufactory, ground or building," within 50 feet of the railway, may call upon the company to purchase such "house, manufactory, ground or building."

Held, that, where a piece of ground, taken under one lease, contained a principal dwelling-house and garden, occupied by a manufacturer, a manufactory, smaller dwelling-houses in the occupation of under-tenants, and the

principal dwelling-house and garden only were within the 50 feet, and the company did not wish to buy any part of the property, that the owner could not compel them to buy more than the dwelling-house, yard and garden. *Reg. v. London and Greenwich Railway Company.* 444

Inquisition to take Lands—Notice of Inquisition, &c.

5. In an action for use and occupation, the defendants set up as a defence that they had been lawfully evicted by the Manchester and Leeds Railway Company, under the provisions of 6 & 7 Will. 4, c. cxi.

By sect. 138 of the act it was enacted, that if any land-owner should not agree with the company as to the amount of the purchase-money for his land—or should refuse to accept the purchase-money offered, and give notice thereof within one month after the offer—or should refuse to treat after twenty-one days' notice to treat—or should not agree for the sale of his land—or should from absence or disability be incapable of agreeing—or should not disclose his title—or in any case where an agreement could not be made—then the company should issue their warrant to the sheriff, commanding him to summon a jury to assess the purchase-money for such land; and the sheriff was to give judgment for such purchase-money, and the verdict and judgment were to be conclusive upon all persons, &c.: Provided that seven days' notice should be given, by the company to such land-owner, of the time and place of holding the inquisition.

By sect. 140, the verdict of the jury and the sheriff's judgment were to be kept as a record.

By sect. 5, the company might take land, although omitted from

the usual parliamentary schedule of lands required by the company, if it should appear to two magistrates, in case of a dispute about the same, and be certified under their hands, that such omission proceeded from mistake.

A special verdict found that the premises in question of the plaintiff consisted of a house, and also of a yard and garden occupied therewith, and included in the description of such house, and that two justices certified that the "house" had been omitted from the parliamentary schedule by mistake.

The verdict also stated that the company had given the plaintiff notice to treat; that he did not disclose his title or agree for the sale; that the company thereupon issued their warrant for assessing the amount of purchase-money to be paid to him, and gave him due notice of the inquisition; that the inquisition was had, before the sheriff, assessing such amount; that the sheriff had given judgment for the same, and that the company had paid it into the Bank of England to the plaintiff's credit.

The certificate of justices, the notices, the inquisition, and the warrant which was annexed to the inquisition, were set out.

The warrant contained no recital of any antecedent fact, but proceeded simply "We, &c. do by this our warrant, pursuant to the powers given us by the said act, &c. command you the sheriff to summon a compensation jury, &c."

The inquisition in like manner contained no recital of any antecedent fact, but merely stated that the compensation jury had been returned in obedience to the warrant, and, after stating the purchase-money awarded, concluded by stating that the sheriff gave judgment for the same, pursuant to the act.

It was objected, to the warrant and inquisition, that they did not upon the face of them state sufficient facts to shew jurisdiction, because they did not state which of the cases under sect. 138 had arisen, as to non-agreement or otherwise, to justify the exercise of the company's compulsory power to take the plaintiff's land, or state the certificate of justices.

There was also an objection to the inquisition separately, that it did not state the notice of inquisition.

Held, 1. That as the warrant was annexed to the inquisition, they were to be taken as one entire proceeding, and that any deficiency in either instrument might be supplied by reference to the other, and that, as it appeared from the warrant that it had been issued, and from the inquisition that judgment had been given for the purchase-money, pursuant to the act, the proceedings themselves afforded the necessary intendment, that a previous agreement for the purchase-money could not be made.

2. With regard to the omission to state the certificate, that the statement was unnecessary, as the effect of the certificate was simply to place the lands omitted from the parliamentary schedule on the same footing as if they had been inserted therein.

It was also objected to the certificate, that it did not state there had been any "dispute," so as to give jurisdiction to the certifying justices, and that it certified as to the "house" only, without mention of the yard and garden.

Held, 1. That the application to the certifying justices of itself shewed there had been a dispute within the meaning of sect. 5.

2. That, as the verdict found the yard and garden had been occupied with the house, as parcel thereof,

they were included with the house in the certificate. *Taylor v. Clemson*. 346

6. *Construction of way-leave Clause in Lease, under which Railway made.*

Case by a reversioner against a Railway Company for entering and making a railway on his land.

Plea, that, before the reversion of the plaintiff, the dean and chapter of Durham were seised in fee, and by indenture between them and the plaintiff demised to the plaintiff the lands in question for a term "excepting and reserving the mines under the same, with power to dig, win and carry away the said mines, with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggon ways in and over the last mentioned premises or any part thereof." The defendants then justified the making the railway as the servants of the dean and chapter, and by their authority.

Replication, (admitting the seisin in fee of the dean and chapter, and the demise to the plaintiff, and that he had no other title except under such demise), *de injuriâ* &c. Issue thereon.

On the trial it appeared that the Railway Company had made a double line of railway on the plaintiff's land, under a deed executed by the dean and chapter, and authorising the Company to make such a railway for the conveyance of *passengers, goods, coals, wares and merchandize*. The railway was constructed for the purpose of con-

veying general goods and passengers as well as coals, but had not been actually so used, and the railway was not more than was necessary for the carriage of the coals likely to be sent along it from the country with which it communicated.

The judge directed the jury that, if they thought the railway was made for other purposes *as well as* for the carriage of coals, the plaintiff was entitled to their verdict.

Held, 1. That, if the railway was such a railway as the Company, at the time when it was made, might lawfully make for the purposes for which, when made, they might lawfully use it, the plaintiff, as reversioner, had no ground of complaint by reason of the intention of the Company also to use the railway for other purposes for which they had no right to use it, and that the direction of the judge was wrong.

2. That the proper construction of the exception clause in the indenture of demise by the dean and chapter to the plaintiff was, that the clause gave the dean and chapter, not a general power of making ways and granting way-leaves for all purposes, but for the limited purpose only of getting the excepted minerals.

That the right possessed by the dean and chapter under the clause as lessors, was not the subject of an exception, as it was no parcel of the thing granted, nor of a reservation, as it did not issue out of the thing granted, but that it was an easement newly created by way of grant from the lessee, and that it was to be taken that the lease was executed by the lessee, although it was not stated to be so.

That the proper question for the jury was, not whether the railway was made for other purposes as well as for the carriage of coals and

minerals, but whether at the time when the road was made it had become necessary or expedient for the Company to make a road for the purpose of getting the excepted minerals, and if so, whether the road actually made was a proper road for that purpose, assuming it would be used for no other purpose.

Durham and Sunderland Railway Company v. Walker. 326

RATE.

Poor rate. See POOR AND RAILWAY COMPANY.

Church rate. See ECCLESIASTICAL LAW, 2.

Borough rate, what is, so as to disqualify a burgess for non-payment. See BOROUGH, 1.

County Rate.

On a question of liability to county rate this Court will not decide whether a charter of incorporation to a borough is valid. See CORPORATION, 1.

RATES AND TAXES.

What are "parliamentary." See BRIDGE, 2.

RATIONE TENURÆ.

See BRIDGE, 2.

RE-DEMISE.

Covenant to allow mortgagor to occupy. See MORTGAGE.

RENT-CHARGE.

Replevin for stacks and trusses of hay, and stacks of oats.

Avowry, that a third person was seised of the premises in which &c., and, being so seised, he by indenture granted to the defendant an annuity or rent-charge to be charged

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upon and issuing and taken from the premises, and that in case it should be in arrear, that it might be lawful for the defendant to enter upon the premises to distrain, in the same manner as the law directs in case of rent in arrear.

Held, on general demurrer to the avowry, that the grantee might, under 2 *Will.* 3, c. 5, and 4 *Geo.* 2, c. 28, and the power in the indenture, take the oats and hay in stacks or trusses, as a landlord, under a distress for rent.

Held also, on objection that the defendant could not distrain upon the goods of a stranger, or of one in possession under a subsisting demise made previous to the grant of the rent charge, and that, for aught that appeared in the avowry, the goods distrained might be those of a stranger, or of a person claiming under a previous demise—1, that the goods of a stranger were distrainable for such a rent-charge under such a power; and 2, though the terms in the avowry, "seised of the premises," were not inconsistent with the existence of a subsisting lease, since the possession of the lessee would be that of the lessor, so that the lessor might be said to be "seised," notwithstanding the lease, yet that the objection could not avail, because, if the plaintiff did hold under a lease made prior to the rent-charge, he might and ought to have pleaded that fact. *Johnson v. Faulkner.* 184

REPLEVIN.

In replevin a defendant may pay money into Court as to a part of the distress and avow as to the residue. *Lambert v. Hepworth.* 112

RESERVATION.

Exception, grant, easement, wayleave. See RAILWAY COMPANY, 6.

RETURN.

False return, action for. See **MANDAMUS**.

REVERSION.

The lessor of a term of years created by writing not under seal, containing a particular contract of tenancy, conveyed the freehold to the plaintiff. The defendant, the tenant, afterwards and during the term paid rent to the plaintiff, and otherwise admitted him to be his landlord, on the terms of the original demise. In an action of *assumpsit* in which the plaintiff declared as on an original demise by him to the defendant on the terms on which the defendant first became lessee, the defendant traversed that he held of the plaintiff on those terms.

Held, though the term of years first created was still unexpired, that there was on this issue evidence for the jury in support of the demise stated in the declaration by the plaintiff, and that on their verdict affirming such a demise the plaintiff had a right of action for the non-observance of such particular contract of tenancy.

Quære, whether the plaintiff could have recovered if the defendant had pleaded non-*assumpsit*.

The defendant had formerly pleaded non-*assumpsit* as well as non-tenuit. A judge at chambers had ordered one of these pleas to be struck out, giving the defendant the election to retain either of them.

Scemle, both pleas ought to have been allowed, but the Court refused on that ground to grant a new trial, with liberty to plead *de novo*, the defendant having retained non-tenuit instead of the other plea, which would have raised the intended defence. *Brydges v. Lewis*.

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REVIEW, COURT OF.

Jurisdiction to supersede fiat. See **PLEADING**, 10.

ROAD.

See **RAILWAY COMPANY**.

ROLL.

Judgment roll and incipitur. See **JUDGMENT**.
Suggestion on roll, instead of *scire facias*. See **EXECUTION**, 2.

ROLLS, MASTER OF.

Judicial notice by Queen's Bench that he is a judge of the Court of Chancery. See **HABEAS CORPUS**.

RULE.

On sheriff to return *ca. sa.* See **CA. SA.**
Where rule discharged, costs, as against a person not party to the rule, how to be applied for. See **COSTS**.

SCIRE FACIAS.

To impeach grant of incorporation to town. See **CORPORATION**, 1.
To get execution against members of joint-stock bank. See **EXECUTION**, 2.
Second *ca. sa.* without *scire facias*. See **EXECUTION**, 1.

SEAL.

Whether lease under seal for more than three years must be signed. See **FRAUDS, STATUTE OF**.
Seal of corporation to deed. See **CORPORATION**, 3.

SEA SERVICE.

Apprenticeship to. See **POOR**, 37.

"SEISED."

Meaning of. See **RENT-CHARGE**.

SESSIONS.

Where an order of justices has been quashed on appeal, subject to a case, and this Court directs the case to be re-stated, the sessions have no jurisdiction to hear evidence thereon, or to confirm or quash the order without a notice by one of the parties to the other, of an intention to proceed at such sessions, which notice may in such a case be given by the respondents.

Serving a copy of the rule of this Court, directing the case to be re-stated, will not dispense with such service of a notice. *Reg. v. Barnes.* 233

Grant of Quarter Sessions. See CORPORATION, 1.

See CERTIORARI—CRIMINAL LAW—POOR.

SET-OFF.

1. The general rule of T. T., 1 *Vict.*, that a defendant need not plead payment of any sums for which credit has been given him in the plaintiff's particulars, does not apply to set-off.

2. Evidence of an agreement to set off mutual demands does not support a plea of payment. *Rowland v. Blakesley.* 734

SHERIFF.

Rule to return ca. sa. See CA. SA.

SHIPPING.

See also INTERROGATORIES.

1. Declaration by shipowners against underwriter of a time policy upon the hull and stores, alleged that on a certain voyage certain pigs were shipped on board the vessel, and that, from stress of weather, it became necessary, for the preservation of the vessel and her cargo, to throw the pigs overboard, by reason whereof the plaintiffs, in respect of their interest in the hull, had to pay a proportionable part

of the value of the pigs, and sustained a general average loss.

Plea: that the pigs so thrown overboard had been stowed on the deck, by reason whereof the defendant was not liable to contribute any average loss sustained by their jettison.

Replication: that at the time of the jettison the vessel was on a voyage between Waterford and London, and that the pigs were stowed on deck according to the usage of the shipping trade between Waterford and London.

On special demurrer to the replication, on the ground that it did not allege that the defendant had notice of the custom, *held*, that the plea itself was bad, as the mere fact of stowing the pigs on deck was no answer to the action. *Milward v. Hibbert.* 142

2. Where a ship was chartered by agreement not under seal, for a voyage from a foreign port to a port in England to load at the foreign port a cargo, and deliver the same on being paid a specified freight, half in cash and half in bills, and a bill of lading was signed to deliver goods to the charterer or his assigns, he or they paying freight for the same as per charter-party: *Held*, that an acceptance under the bill of lading of the goods by an assignee of it did not raise an inference in law of a contract by him to pay freight. *Dict.* Notwithstanding the charter-party such acceptance would be evidence to a jury of a contract to pay freight. *Quære*, whether indebtedness assumpsit for freight is the proper form of declaring on such an implied contract. *Sanders v. Vanzeller.* 244

SIGNATURE.

Whether lease under seal for more than three years must be signed.

See FRAUDS—STATUTE OF.

Signature of burgess list by overseers.

See BOROUGH, 2.

Of attesting Witness.

A person who could neither write nor read being called upon to attest a will, had his hand guided, and so subscribed his name to the will:—*Held*, that the will was properly subscribed, within the 7 *Will.* 4 and 1 *Vict.* c. 26. *Harrison v. Elvin.* 769

SIMONY.

See ECCLESIASTICAL LAW, 1.

SLANDER.

See DEFAMATION.

SODOMY.

Indictment against two persons, charging that they, being persons of wicked and unnatural dispositions, did, in a certain open and public place, unlawfully meet together with the intent of committing with each other, openly, lewdly and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then and there unlawfully, wickedly, openly, lewdly and indecently, did commit with each other, in the sight and view of divers of the liege subjects, &c. in the said public place there passing, divers such practices as aforesaid, to the great scandal and disgrace of mankind, in contempt, &c.: *Held* bad, in arrest of judgment, for want of certainty. *Reg. v. Rowed.* 518

STAMP.

An agreement for sale of a bankrupt's property by his assignees is exempted from stamp duty by 6 *Geo.* 4, c. 16, s. 98. *Flather v. Stubbs.* 290

As to pleading insufficiency of stamp. See PLEADING, 3.

STORES.

Illegal possession of naval stores. See CRIMINAL LAW, 3.

STRAW.

Distress. See RENT-CHARGE.

SUBSCRIBING WITNESS.

To will. See SIGNATURE.

SUGGESTION.

Where scire facias necessary. See EXECUTION, 2.

SUMMARY PROCEEDINGS.

Instead of suit. See CHURCH RATE—FRIENDLY SOCIETY—TITHES, 1.

TAXES.

What are "parliamentary taxes" within the language of a covenant in lease. See BRIDGE, 2.

TENANCY.

See MORTGAGE—REVERSION.

TENDER.

Action for overcharge, as money had and received, though no tender has been made of the sum due. See MONEY HAD AND RECEIVED, 1.

THEATRE.

Occupier of private box liable to poor-rate. See POOR, 5.

TIME.

Computation of. See PRESCRIPTION. Averment of. See PLEADING, 1, and CRIMINAL LAW, 3.

TIN.

Lessee of tin-toll liable to poor-rate. See POOR, 4.

TITHES.

Action for not setting out.

1. The 5 & 6 Will. 4, c. 74, s. 1, which enacts that no proceeding shall be had in his Majesty's Courts "for or in respect of any tithes" under the yearly value of 10*l.*, but that all complaints touching the same shall be summarily determined by justices under the provisions of former statutes, unless the title is in question, takes away the right of action to recover treble value for not setting out tithes of such yearly value, under 2 & 3 Edw. 6, c. 13, s. 1. *Peyton v. Watson.* 750

Tithe for Milk.

2. Milk drawn from the cow by hand and given to the calf before it becomes titheable is exempt from tithe as well as milk sucked by the calf. *Fisher v. Birrell.* 725

TOLL.

Lessee of tin toll liable to poor-rate.
See **POOR**, 4.

TOWN COUNCIL.

See **BOROUGH.**

TOWNSHIP.

Division of parish into townships for the more effectual relief of the poor. See **POOR**, 1.
Consequences of such division upon the place of settlement of the poor of the parish. See **POOR**, 2.

TREASURY, LORDS OF.

Their jurisdiction in cases of compensation for borough offices. See **BOROUGH.**

TRESPASS.

Measure of damages in trespass for taking coal. See **DAMAGES**, 1.

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TROVER.

A bailiff seized the goods of the plaintiff under a *fi. fa.* against a third person, and deposited them in an out-building of an inn, with the assent of the innkeeper. The innkeeper's wife assisted him in the management of his business. On a demand being made to her to deliver up the goods, she said she had seen the attorney of the plaintiff in the original suit, that he had told her not to bother herself about them, he would see her harmless, and that she would not give them up:—*Held*, in an action of trover against the innkeeper and his wife, in which was alleged a conversion by her to her husband's use, that this refusal was evidence of a conversion by her. *Catteral v. Kenyon.* 545

TURNPIKE.

See **RAILWAY COMPANY**, 2, 3.

UNION.

Election of guardians. See **POOR**, 3.

UNITY OF POSSESSION.

See **PRESCRIPTION**, 1.

VENIRE.

A bill of indictment, venue "*Borough of Stamford*," was found at the quarter sessions of that borough. The indictment stated that the defendant *A.*, "of the parish of *M.*, in the county of *Northampton*, and within the borough of *Stamford*, constable, on &c. at the parish aforesaid, in the borough aforesaid, did" &c.

The defendants removed the indictment by *certiorari*; a venire was awarded into *Lincolnshire*, and the defendant was found guilty at the assizes for that county.

The borough of *S.* is partly in *Lincolnshire* and partly in *North-*

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amptonshire. The offence charged was committed in that part of the borough which is in Northamptonshire, within five hundred yards of the Lincolnshire boundary. The borough of Stamford, in the Schedules to the Boundary and Municipal Corporation Acts, is classed as being in the county of Lincoln.

Held, as it appeared a Lincolnshire venire had been awarded to try an offence laid in Northamptonshire, that judgment must be arrested. *Reg. v. Mitchell.* 274

VENUE.

The plaintiff having brought back the venue to London on an undertaking to give material evidence therein, gave in evidence certain charters from the Tower of London, but gave no evidence whatever that the Tower, or that part of it from which the charters were produced, was within the city. The plaintiff was nonsuited:—*Held*, that the judge was not bound to take judicial notice of the boundaries of the city of London, and that affidavits were inadmissible, on a motion for a new trial, for the purpose of shewing that the Tower was, in point of fact, within the city. *Brune v. Thompson.* 110

VIDELICET.

See PLEADING, 1, 7.

VISITING JUSTICES.

Their right to appoint chaplain of County Lunatic Asylum. See LUNATIC.

VISITOR.

Jurisdiction of. See ECCLESIASTICAL LAW, 1.

VOLUNTARY ASSIGNMENT.

See INSOLVENT, 1.

WARRANT.

Of committal, when necessary to the legality of the prisoner's custody. See ESCAPE.

WASTE.

Competency of witness. See EVIDENCE.

WAY.

Reservation, exception, grant, easement. See RAILWAY, 6.

WILL.

Subscribing witness to. See SIGNATURE.

WITNESS.

See EVIDENCE—SIGNATURE.

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